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No. ——

In The Supreme Court of the United States

October Term, 1994

United Food and Commercial Workers International Union, AFL-CIO, and Bernard J. Aning, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

John Morrell & Company,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In suits under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185—which are to be decided under a "single body of federal law," *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) —the Sixth and Fourth Circuits have developed an interpretative rule that treats a collectively bargained promise to provide health insurance to retirees as creating an accrued or vested right in those who retire during the term of the collective agreement. The Eighth and Fifth Circuits have rejected that rule and have derived from their reading of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., an interpretative rule that, absent express vesting language, treats such promises as creating rights that expire upon the termination of the agreement. The Seventh Circuit, in its turn, has developed a third, multi-factor interpretative rule for determining the legal significance of such promises. Against that background, the question presented here is:

> What is the proper, uniform LMRA § 301 interpretative rule that governs suits on a collectively bargained provision for retiree health insurance.

LIST OF PARTIES

All parties to the proceedings in the lower courts are listed on the front cover of the petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United Food and Commercial Workers International Union, AFL-CIO, and Bernard J. Aning respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in *John Morrell & Co. v. United Food and Comm. Workers,* Eighth Cir. No. 93-2863 (Oct. 12, 1994).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 37 F.3d 1302, and is reprinted in the Appendix hereto, at 1a-26a. The order of the Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing and suggestion for rehearing *en*

banc, which has not been reported, is reprinted in the Appendix hereto, at 54a.

The opinion of the United States District Court for the District of South Dakota (Battey, J.), is reported at 825 F.Supp. 1440, and is reprinted in the Appendix hereto, at 27a-53a.

JURISDICTION

The decision of the Eighth Circuit was issued on October 12, 1994. Petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. An order denying that petition was issued on January 17, 1995. On April 10, 1995, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including May 2, 1995.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Facts

For forty years, respondent John Morrell & Co. ("Morrell" or "the Company") and petitioner United Food and Commercial Workers International Union or its pred-

ecessors ("the Union") have been parties to a set of successive collective bargaining agreements. From 1967 until 1988, each successive contract contained a provision which obligated Morrell, at company expense, to provide to "Employees who retire during the term of the Agreement" or to "Employees who retire on or after" the effective date of the Agreement, and their dependents, health care benefits which were specified in Appendix F to the Agreement.[1] Each agreement was for a three-year term and each stated that the "Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of the agreement."

Prior to 1979, Appendix F provided that the health care coverage would terminate at the end of the month in which the retiree died. Since 1979, Appendix F has provided an option under which "coverage shall continue" for dependents after the retiree's death.[2]

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[1] Prior to 1976, the retiree health provision referred not only to those who retired during the term of the Agreement but also to "presently covered retirees" or to "retirees currently furnished . . . coverage." Beginning in 1976, the Company ceased to recognize the Union as the exclusive bargaining representative of past retirees, the language of the Agreement was limited to that quoted in text and the situation of the past retirees was dealt with in company-union negotiations separate from those covering the active employees.

[2] Pursuant to this provision, upon retirement each retiree was given a form entitled "Retirement Information" which stated that "For continued health care benefits for an employee's spouse and dependents beyond the life of the retiree, employee must select a Joint and Survivor Form of Pension." A number of retirees testified that they were told by Morrell that if they made this election "I would have the benefits for the rest of my life" and my spouse "would receive the benefits for the rest of her life." Pet. App. 15a (dissent of Judge Heaney quoting testimony of Larry McFarland).

In addition, in 1976, a provision was added to Appendix F to provide "separation retirees"—workers between the ages of 50 and 54 who, upon a plant closing, elected a "separation pension"—with health care coverage which would continue for five years at which time these individuals would then qualify for normal retiree coverage.

None of the agreements contained any provision reserving to Morrell a right unilaterally to modify the terms of the retiree health coverage. To the contrary, in 1983 language was added to the preamble to Appendix F under which the Appendix would be "subject to termination, modification, or extension upon the termination of [the] Master Agreement," but that language specifically excluded Section B, the section specifying the retiree benefits. And, none of the agreements expressly addressed the interplay between the agreements' durational provisions and the provisions defining the time periods for which retirees and their families would be covered by health insurance.

Pursuant to these agreements, from 1967 forward, every hourly employee who retired received health benefits from Morrell from the time of retirement until death. Since 1979, the surviving spouse of each retiree who elected a survival pension likewise was provided retiree health benefits from Morrell until death or remarriage.[3] The retirees and their spouses received these benefits without interruption even though the agreements terminated on several occasions during this period, and even though the health benefits of the active employees were suspended during strikes against Morrell.

In March, 1991, after succeeding in collective bargaining with the Union in negotiating away health care coverage for future retirees, Morrell sent a letter to those who had retired under the prior agreements stating that "The Company reserves its legal rights, at its sole dis-

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[3] Until 1979, Morrell maintained separate retiree health packages for retirees depending upon when the individual retired and reflecting the benefits that had been negotiated as of the time of retirement. In 1979, Morrell and the Union agreed to a single retiree plan which had the effect of improving the benefits for some retirees. Additional improvements took place in subsequent years. In 1983, the parties negotiated improvements in some areas but also agreed to modifications that were also made in the plan for the active employees and that provided certain new deductibles and co-insurance requirements.

cretion, to alter, modify, or terminate any plan or benefit at any time." In December, 1991, Morrell announced the first unilateral reduction in retiree health benefits.

On the very day that Morrell announced this reduction, the Company instituted this declaratory judgment action. Named as defendants were both the Union and Bernard Aning, a Morrell retiree, who was sued "individually and on behalf of a [defendant] class" consisting of all individuals who had retired under one of the collective bargaining agreements providing for retiree health insurance.

Proceedings Below

The district court held a four-day bench trial at which the parties presented conflicting evidence regarding their intent in negotiating the various agreements and at which the petitioners presented undisputed evidence regarding the parties' course of dealings under those agreements. Following the trial, the district court ruled for the Company, concluding that the retirees "do not have vested . . . benefits" and that "Morrell may unilaterally change or eliminate existing benefits." Pet. App. 53a. Petitioners appealed, and a divided panel of the Eighth Circuit affirmed.

The panel majority began its opinion by outlining what it understood to be the "Governing Legal Principles":

> ERISA [the Employee Retirement and Income Security Act, 29 U.S.C. § 1001 *et seq.*] requires that pension plans meet minimum vesting standards. But vesting is not mandatory for "employee welfare benefit plans"—plans that offer the health care benefits here at issue. An employer may unilaterally modify or terminate health benefits "absent the employer's contractual agreement to the contrary," even if some benefits have been paid. Thus, although ERISA is the governing law, this case turns on whether vested health benefits were contractually conferred in the Master Agreement between Morrell and the Union. The Union has the burden of proof on this issue. [Pet. App. 3a; citations omitted]

The panel majority went on to observe that "Appendix F, which contained the health care benefits here at issue, had no express vesting provisions" and that the Union was arguing that "an intent to confer vested benefits" could be inferred from the language and history of the Appendix. The majority read ERISA to place upon the Union "a difficult, though not impossible burden of persuasion with this argument since courts are reluctant to read more benefits into an ERISA plan than its plain language confers." Pet. App. 3a-4a.

The panel majority proceeded to examine the contractual language and bargaining history through the lens set forth in its "Governing Principles" discussion emphasizing the "absence of any explicit vesting language" which the majority viewed as "strong evidence of the parties' intent to limit retiree benefits to the term of the Master Agreement," Pet. App. 10a, and the "term of the Master Agreement," Pet. App. 10a, and the "term clauses that are inconsistent with vesting," Pet. App. 12a. The majority dismissed the significance of the fact that Appendix F permitted modifications "other than as provided under Section B"—the retiree provisions—because "there is no general reference to vesting in Section B." *Id.* And, the majority viewed the provision under which coverage "shall continue" either until the month of the retiree's death or beyond for dependents as "ambiguous" and insufficient to "overcome the other provisions." *Id.*[4]

Senior Judge Heaney dissented. Judge Heaney rejected the majority's view that the petitioners bore a "difficult . . . burden"; in his view, the "burden is no greater and

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[4] The panel majority thus interpreted the Agreement as creating "limited vested retirement health benefits" for a five-year period for the "separation retirees" but as creating no vested rights for those—including the separation retirees—who reached normal retirement. Pet. App. 12a. And, the panel majority concluded that retirees who elected the survivor spouse option secured for their spouse only "whatever non-vested retiree health benefits Morrell provides from time to time." *Id.*

no less than in any other contract case." Pet. App. 14a. Whereas the majority emphasized the absence of express vesting language, Judge Heaney stressed that "the agreements failed to include a single provision that informed the Union, the active employees, or the retirees that the four-decade practice of providing health benefits could be discontinued at the end of any collective bargaining agreement." Pet. App. 20a. Judge Heaney concluded:

> For four decades Morrell and the Union negotiated retirees' health benefits. In 1991, for economic and competitive reasons, Morrell decided to charge retirees for health benefits. Were it not for its bargain with the Union to continue to provide health benefits to retirees, it would have a right under ERISA to make that change. Morrell certainly had the right to make this decision with respect to future retirees, but not with respect to employees who had already retired. Morrell made the bargain, and no court may refuse to enforce this bargain which was entered into freely and which cost active employees higher wages and better working conditions, which they agreed to because they were concerned about hospital and medical bills for themselves and their spouses after they retired. [Pet. App. 26a]

Petitioners filed a timely petition for rehearing which was denied by the court of appeals on January 17, 1995. Pet. App. 54a.

Immediately thereafter Morrell announced the complete termination of health benefits for all retirees.

REASONS FOR GRANTING THE WRIT

THERE IS A DEEP AND IRRECONCILABLE CIRCUIT CONFLICT ON THE GOVERNING FEDERAL LABOR CONTRACT RULES AS TO WHEN RETIREE HEALTH INSURANCE PROVISIONS CREATE AN ACCRUED OR VESTED RIGHT

I.

A. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, is that rarest of labor statutes: a provision with one, clear cut, indisputable objective—the decision of collective bargaining agreement suits according to a "single body of federal law." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Congress' single-minded focus on achieving "interpretive uniformity and predictability," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), was such that § 301 not only authorizes the development of a federal common law of labor contracts but also requires the state courts to apply that law. *Lucas Flour*, 369 U.S. at 104. Indeed, § 301's "pre-emptive force" is so "powerful" as to "displace[] all state actions for violations of contracts between an employer and a labor organization." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987). And, this rule extends even beyond actions for breach of a labor contract to any "state law claim [whose resolution] is substantially dependent upon the analysis of the terms of an agreement made between the parties in a labor contract." *Id., quoting Allis Chalmers Corp. v. Lueck*, 471 U.S. at 220.

B. In terms of the human and financial stakes involved—as well as the sheer volume of litigation—no class of § 301 suits is more significant today than the one growing out of contractual provisions to provide health insurance to retirees.[5] And, in no class of cases

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[5] As we show *infra* at 18-19, the well-being of millions of retirees —and the disposition of millions of dollars in corporate resources— turns on whether collectively-bargained entitlements to retiree

have the courts of appeals fallen so short of achieving § 301's goal of a "single body of federal law."

As we show below, there is now a deep and irreconcilable conflict among the circuits as to the governing labor contract rules in determining whether collectively bargained promises of retiree insurance create rights which accrue or vest upon retirement. The Sixth Circuit, joined by the Fourth, has formulated one interpretive rule; the Eighth Circuit, along with the Fifth Circuit, has expressly rejected the Sixth Circuit's rule and has formulated a directly contrary one; and the Seventh Circuit has formulated yet a third rule.

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health insurance create accrued or vested rights. Not surprisingly, therefore, this issue has generated the large volume of federal court of appeals decisions collected below:

See, Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3rd Cir. 1984); *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60 (4th Cir. 1989); *Paperworkers v. Champion International Corp.*, 908 F.2d 1252 (5th Cir. 1990); *Autoworkers v. Yard-Man Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007; *Autoworkers v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1987); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1983); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985); *Smith v. ABS Industries, Inc.*, 890 F.2d 841 (6th Cir. 1989); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992; *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 291; *Food and Commercial Workers Local 150-A v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988) *cert. denied sub. nom. Anderson v. Slattery Group, Inc.*, 489 U.S. 1051 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096; *Stewart v. KHD Deutz of America*, 980 F.2d 698 (11th Cir. 1993). *Cf. also In re Chateaugay Corp.*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied sub. nom. UMW 1994 Benefit Plan v. LTV Steel Co.*, 112 S.Ct. 1167 (1992); *Mine Workers District 17 v. Allied Corp.*, 765 F.2d 412 (4th Cir. 1984), *cert. denied*, 473 U.S. 905; *Mineworkers District 29 v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985), *cert. denied*, 485 U.S. 935.

The result of this conflict is, in Circuit Judge Frank Easterbrook's words, that "uncertainly now reigns. . . . Employers with national operations are subject to multiple and inconsistent rules, compounded by the uncertainty inherent in sending big-stakes questions to the constantly-changing panels that are juries." [6] Thus, as William Kilburg, former Solicitor of Labor and current editor-in-chief of the Employee Relations Law Journal, has written, "It is time for the Supreme Court to weigh in" to resolve what Kilberg terms, "the growing chasm among the circuit courts on the duration of retiree welfare benefits." [7]

C. Our contention here is not novel; indeed, it has been put before this Court in a succession of *certiorari* petitions in recent years as the conflict among the circuits has unfolded. Successive respondents have met those petitions with the rejoinder that the evident lack of uniformity in the retiree health insurance litigation outcomes is the product not of conflicting legal rules but of nice—and legally significant—differences in the fact pattern of the cases.

It has not been difficult to give that counter a certain plausibility. After all, the contract law's aim is to give effect to the parties' agreed-upon rules, not to create uniform public law rules that apply regardless of the parties' desires. And, disputes over what an agreement means are normally generated by contract language that is less than crystal clear and must be resolved against negotiation and implementation backgrounds that have some variation from case to case.

Be all that as it may, the reality is that the *experts* on this point—the lawyers who litigate these cases—know, have now stated to the world, and are now acting

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[6] *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 620 (dissenting opinion).

[7] Kilberg, *Retiree Welfare Benefits, Part III*, 19 Empl. Rel. L.J. 175, 177 (1993).

on their knowledge that, as union-plaintiffs attorney William Payne has written, "Until the Supreme Court speaks on this issue, the outcome of important cases will frequently depend on the circuit in which the case is brought." [8] As a result, in the words of management attorney Michael Melbinger, "a canny litigator can obtain a considerable advantage by careful choice of the forum for litigation." [9]

The instant case provides a paradigm illustration of how "canny litigators" are able to devise artful ways of controlling the choice of forum. Morrell's lead counsel in this case has urged employers to file a declaratory judgment suit "in an advantageous forum" before retirees or the union are able to move to enforce their contract.[10] Heeding this advice, Morrell took the extraordinary step of filing this lawsuit as a defendant class action, naming one retiree, Bernard Aning, as the alleged representative of a defendant class consisting of all the retirees and their dependents. Leaving nothing to chance, Morrell raced to court on the very same day that it acted to reduce the retiree benefits.

In filing suit, Morrell made no pretense that it was seeking a declaratory judgment to enable the Company to determine how to proceed vis-a-vis its retirees. To the contrary, the letter Morrell sent to the retirees on the day the lawsuit was filed announced that the Company already had concluded that it was not bound to continue the retirees health insurance in force. The purpose of this lawsuit, then, was not to inform Morrell's conduct but to preempt the retirees from filing a suit of

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[8] Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective*, 10 Lab. L.J. 91, 119 (1994).

[9] Melbinger & Culer, *The Battle of the Result Belt: Employers' Right to Modify the Medical Benefits of Retirees*, 5 DePaul Bus. L.J. 139, 161 (1992).

[10] Boies & Ross, *The Struggle Over Retiree Medical Benefits: Who's on Top*, 19 Emp. Rel. L.J. 169, 185 (1993).

their own, which they no doubt would have filed in the Sixth Circuit where Morrell is headquartered. Indeed, in interviews with *The Wall Street Journal*, Morrell's lawyers acknowledged as much:

> McDermott Will, knew that the eighth federal judicial circuit . . . has been more favorable to employers in such cases than has its judicial counterpart in Ohio, where Chiquita [Morrell's parent company] is based. Suing in South Dakota also increased the chances of getting a "pro-business" judge, says Michael Melbinger, a McDermott Will lawyer working on the Morrell case. [*Wall Street Journal*, February 24, 1993 at 1]

This is precisely the state of affairs that § 301 was enacted to prevent. As we show below, the instant case provides the appropriate occasion for this Court to provide the order and uniformity that is so sorely needed.

II.

A. LMRA § 301, as we noted at the outset, is a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 209. Absent such "uniform law . . . individual contract terms might have different meanings" in different jurisdictions, and that "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 211.[11]

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[11] The *Lueck* Court elaborated:

> Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation . . . would tend to stimulate

It is the principal office of the federal courts, in effectuating the "congressional mandate" of § 301 to formulate interpretative rules to guide the determination of common and recurring questions arising as to "the meaning given a [labor] contract phrase or term." *Allis-Chalmers v. Lueck*, 471 U.S. at 211. And, when the lower federal courts divide as to the appropriate rules to be applied, it becomes the responsibility of this Court to assure the "interpretive uniformity and predictability," *id.*, that is § 301's *raison d'etre*.

Such a division exists today as to whether collectively-bargained provisions for retiree insurance require that those who retire under the contract continue to receive their benefits after the contract expires.

The background law for resolving this issue is stated in *NLRB v. Litton Financial Printing Division*, 501 U.S. 190, 206 (1991): "Rights which accrued or vested under [an] agreement will, as a general rule, survive termination of the agreement." But that principle's significance turns on the content given the concept of "accrued or vested" rights. And, the courts of appeals are split into warring camps over the interpretive rules to be applied to determine whether retiree health provisions create such rights.

B. In the Sixth Circuit, the rule is that "normally retiree health benefits are vested." *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d at 672. This rule is derived from the decision in *Auto Workers v. Yard-Man, Inc., supra*, which reasons that, "when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." 716 F.2d at 1482.

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and prolong disputes as to its interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." [471 U.S. at 211, *quoting Teamsters Local v. Lucas Flour Co.*, 369 U.S. at 103-04].

The *Yard-Man* rule rests on two bases. First, *Yard-Man* recognizes that retiree benefits "are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* Second, *Yard-Man* emphasizes the legal context in which, under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. retiree insurance entitlements are negotiated:

> Benefits for retirees are only permissive not mandatory subjects of collective bargaining. [*Allied Chemical & Alkali Workers v.*] *Pittsburgh Plate Glass Co.*, 404 U.S. [157,] 181-82 [(1971)]. As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. The employees are presumably aware that the union owes no obligation to bargain for continued benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. 716 F.2d at 1482.

This context, the Sixth Circuit concluded, "demonstrates the likelihood that continuing insurance benefits for retirees were intended." *Id.*

In its most recent decision on point the Sixth Circuit crystallized its position as follows: "Because [retiree] benefits are deferred compensation, it is unreasonable to suppose that the parties to the collective bargaining agreement intended to permit [the employer] to terminate the retirement insurance program unilaterally." *Armistead v. Venitron Corp.*, 944 F.2d at 1297.

The Eighth Circuit takes the opposite position. In *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d at 1517, that court expressly stated: "we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest." The Eighth Circuit reasoned that the

interpretive rule to be applied to this class of cases should be fashioned from what that court understood to be the policies underlying the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). *Anderson's* main point is that:

> Congress explicitly exempted welfare benefit plans from ERISA's vesting requirements. It therefore seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. [836 F.2d at 1517][12]

In the instant case, the Eighth Circuit pushed its ERISA analysis further. Beginning again from the proposition that under ERISA, "vesting is not mandatory for 'employee welfare benefit plans'—plans that offer the health care benefits here at issue," the court below drew the conclusion that absent "express vesting provisions" the "Union shoulders a difficult, though not impossible, burden of persuasion . . . since courts are reluctant to read more benefits into an ERISA plan than its plain language confers." Pet. App. 3a-4a. And, in holding that the Union had failed to shoulder this burden here, the Eighth Circuit relied heavily on the absence of any express vesting language, *see supra* at 5-6.[13]

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[12] The *Anderson* court purported to distinguish the Eighth Circuit's early decision in *Local No. 150-A v. Dubuque Packing, supra.* That case, while not citing *Yard-Man,* had followed the Sixth Circuit's approach, reasoning that the right to retiree benefits "arises from the retiree's status as a past employee" and this status "cannot be affected by future negotiations or agreements between the Company and the Union." 756 F.2d at 70. That the *Anderson* court took a decidedly different approach is perhaps best evidenced by the fact that in the instant case—which, like *Dubuque,* involves contracts negotiated through pattern bargaining in the meat packing industry and in which, as Judge Heaney noted, "the [contractual] language . . . is identical to that in *Dubuque Packing,*" Pet. App. 21a—the result is the opposite of the result in *Dubuque.*

[13] In support of its allocation of the burden of persuasion quoted in text, the court below cited three cases, each of which involved interpretation of unilateral employer-created ERISA plans, not

The courts of appeals have begun to choose up sides in this Sixth Circuit-Eighth Circuit disagreement. The Fourth Circuit has aligned itself with the Sixth Circuit, stating that the *Yard-Man* rule is "consistent with a more far-reaching understanding of the context in which retiree benefits arise." *Keffer v. H.K. Porter, Inc.*, 872 F.2d at 64. The Fifth Circuit sides with the Eighth Circuit:

> To the extent that *Yard-Man* held that there is, as a general proposition, an inference of an intent to vest retirement benefits, we find merit in the Eighth Circuit's criticism in *Anderson* of this aspect of *Yard-Man* and find no basis in logic or federal labor policy for such a broad inference. [*Paperworkers v. Champion Int. Corp.*, 908 F.2d at 1261-62] [14]

The Seventh Circuit has added to the disarray in the circuit law. In *Bidlack v. Wheelabrator Corp., supra*, that court, sitting *en banc*, split three ways, with three judges expressly supporting *Yard-Man* and arguing for a rule which would "presume that benefits vest," 993 F.2d at 611-12 (Cudahy, J., concurring); four judges adopting

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collective bargaining agreements. Pet. App. 4a. These citations illustrate that the considerations of labor policy that weighed so heavily in *Yard-Man* play no role in the Eighth Circuit's analysis.

There is more than a little irony in the Eight Circuit's reliance on ERISA to justify its no-vesting rule. Prior to the enactment of ERISA, it was generally well-settled that even retirement benefits that were unilaterally created by an employer become vested contractual rights promises of retiree upon retirement. *See* B. Aaron, *Legal Status of Employee Benefit Rights Under Private Pension Plan*, 9-10, 13-14 (1961). Thus here, as in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989), the decision below "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted" notwithstanding the fact that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans."

[14] The Eleventh Circuit in *Stewart v. KHD Deutz*, 980 F.2d at 702 n.3, contented itself with noting the split in the circuits while finding it unnecessary in that case to state its preference.

what amounts to the Eighth Circuit rule that "the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires," *id.* at 616 (Easterbrook, J., dissenting); and a three-judge plurality announcing an in-between rule which rejects both any presumption of vesting but also any requirement of express vesting language, *id.* at 607-08 (Posner, J.).[15]

The short of the matter, then, is this. There is, at the least, a Sixth Circuit *Yard Man* rule (followed in the Fourth Circuit), and a counter Eighth Circuit *Anderson* rule (applied in this case and followed in the Fifth Circuit). And, it is fair to say that there is also a Seventh Circuit *Wheelabrator* rule that is different from both.

To be sure, none of these rules is absolute. As we have noted, within wide limits, contract law is a law of party sovereignty whose aim is to effectuate the parties' agreement. But, as § 301 recognizes, interpretive rules *do* matter. That is why Congress decided that those rules must be *uniform*. And, that congressional decision is particularly to the point where, as here, the § 301 interpretative rules are outcome determinative: in the Sixth Circuit, the *Yard-Man* inference almost always carries the day and collectively-bargained promises of retiree benefits are consistently interpreted to create accrued or vested rights;[16] in the Eighth Circuit, such promises do

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[15] The confusion in the Seventh Circuit is perhaps best evidenced by the fact that the judges in *Bidlack* could not agree as to the continuing vitality of a prior panel decision in *Senn v. United Dominion Industries, supra. Compare Bidlack*, 933 F.2d at 610 ("*Senn* and its default rule now do seem to me to be a dead letter") (Cudahy, J., concurring) *with id.* at 616 ("[a] majority of this court . . . reaffirms *Senn*" (Easterbrook, J., dissenting).

[16] That was the result not only in *Yard-Man* but also in *Autoworkers v. Cadillac Malleable Iron Co., supra*; *Policy v. Powell Pressed Steel Co., supra; Weimer v. Kurz-Kasch, Inc., supra; Smith v. ABS Industries, Inc., supra*; and *Armistead v. Vernitron Corp., supra.*

not have that effect.[17] This is precisely the result § 301 was enacted to prevent.

C. The practical consequences of this conflict could not be more profound. There are, today, upwards of 3,000,000 retirees (and many more dependents) who receive retiree health insurance coverage pursuant to a collective bargaining agreement.[18] Whether these individuals are entitled to their health benefits throughout their retirement—or whether, *per contra*, employers can reduce retiree benefits and the attendant employer liabilities—depends upon where "canny litigators" are able to maneuver a lawsuit. *See supra* at 9-11.

In addition, there are, today, upwards of 4,000,000 active employees over the age of 45 whose collective bargaining agreement provides for health insurance upon retirement.[19] Whether these individuals will have a vested right upon retirement depends upon the court that makes the decision.

From the employer perspective, it is fair to say that the cost of retiree health insurance is "material" in the

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[17] That was the result in *Anderson* and in the instant case.

[18] According to the Employee Benefit Research Institute's calculation from the August, 1988 Current Population Survey, there were in 1988, 10,358,000 retirees covered by their former employer's health plan. EBRI, *Retiree Health Benefits* (1991). While this analysis does not separate out union and non-union retirees, it is a fair assumption that the proportion of retirees whose insurance was collectively bargained is at least as great as the proportion of current employees whose entitlement to retiree health care was collectively bargained. *See infra* at n.19.

[19] Employee Benefit Research Institute, *Employment Based Health Benefits: Analysis of the April 1993 Current Population Survey*, Table 14. This report shows that 3,300,000 union members work under contracts which provide for employer-paid retiree health insurance and that information is not available on another 1,400,000 union members. The estimate in text assumes that the latter group enjoy retiree benefits to the same extent as the group for whom information is available.

accountants' sense of that term. The accrued liabiilty of all employers for retiree health insurance has been estimated at as much as $500 billion and a substantial share of that is generated by collectively bargained agreements.[20] It is not surprising, therefore, that so many employers are seeking to reduce or zero out that cost. Nor is it surprising that these employers pay and pay well for aggressive lawyering that secures a favorable forum.

Section 301's point is that the meaning of even an "unimportant" provision of a collective bargaining agreement provision should not turn on the law of the forum in which that question is litigated. Whether that is hopeless idealism or not, given the enormous stakes that are involved here—both for the retirees and their dependents whose access to affordable medical care is at stake and for the employers for whom providing retiree health insurance is such a substantial cost—the instant class of cases is the last class in which decisions of employee rights and employer duties should be allowed to turn on such vagaries

All that being so, we submit that the time has come for this Court to resolve the circuit conflict that obtains and determine the appropriate § 301 rule governing the interpretation of collectively-bargained promises of retiree health insurance.

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[20] Deloittle & Touche, *Retiree Benefits: Tackling a Complex Issue* p. 1 (1990).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FILED

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, and BERNARD J. ANING, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

JOHN MORRELL & COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-2863

JOHN MORRELL & CO.,
Plaintiff-Appellee,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; BERNARD J. ANING, as representative of a defendant class,
Defendants-Appellants.

Appeal from the United States District Court
for the District of South Dakota

Submitted: February 16, 1994

Filed: October 12, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

John Morrell & Co. ("Morrell") and the United Food and Commercial Workers (the "Union") were parties to "Master" collective bargaining agreements from the 1940's until April 1, 1989. In 1991, after negotiating a new collective bargaining agreement, Morrell and the Union disagreed over whether the expired Master Agreements obligate Morrell to pay continuing health benefits to hourly employees who retired before April 1, 1989.[1] Morrell commenced this action against the Union and a class of retired hourly employees (the "Class") seeking a declaration that it may unilaterally modify or terminate those health care benefits. The Union contends that these are vested lifetime benefits, a legal issue governed by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

After the district court[2] denied the Union's motion to compel arbitration, the parties completed discovery and proceeded to trial.[3] Following a four-day bench trial, the district court found that the retiree health benefits afforded in the various Master Agreements were limited to the three-year term of each Agreement. Accordingly,

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[1] Like the parties, we will use the phrase "hourly employees" to mean Morrell employees who are represented by the Union. Thus, an hourly employee who retired before April 1, 1989, was covered by a Master Agreement when he or she retired.

[2] The HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota.

[3] On appeal, the Union argues that we should compel arbitration. However, the Union waived this issue when it did not appeal the denial of its motion to compel arbitration, causing the parties to incur the expense of discovery and a trial on the merits. *See Ritzel Communications, Inc. v. Mid-American Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993). A party may not "allow the substantive lawsuit to run its course (which could take years), and then, if dissatisfied with the result, seek to enforce the right to arbitration on appeal from the final judgement." *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993).

the court concluded that those benefits are not contractually vested under the Master Agreements nor legally vested under ERISA and granted Morrell the requested declaratory relief. *John Morrell & Co. v. United Food & Commercial Workers Int'l Union*, 825 F. Supp. 1440 (D.S.D. 1993). The Union and the Class appeal. We affirm.

I. Governing Legal Principles.

ERISA requires that pension plans meet minimum vesting standards. *See* 29 U.S.C. § 1053. But vesting is not mandatory for "employee welfare benefit plans"—plans that offer the health care benefits here at issue. *See* 29 U.S.C. §§ 1002(1), 1051(1). An employer may unilaterally modify or terminate health benefits "absent the employer's contractual agreement to the contrary," *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990), even if some benefits have been paid, *see Meester v. IASD Health Servs. Corp.*, 963 F.2d 194, 197 (8th Cir. 1992). Thus, although ERISA is the governing law, this case turns on whether vested health benefits were contractually conferred in the Master Agreements between Morrell and the Union. The Union has the burden of proof on this issue. *See Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-17 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989).

The Master Agreements each contained multiple appendices setting forth various employee benefit plans. For example, Appendix G contained the Supplemental Agreement on Pensions. Consistent with ERISA, Appendix G included vesting provisions and expressly referred to "Vested Pensions." On the other hand, Appendix F, which contained the health care benefits here at issue, had no express vesting provisions. The Union argues that an intent to confer vested benefits may nonetheless be derived from ambiguous language in Appendix F construed in light of the parties' lengthy collective bargaining history. The Union shoulders a difficult, though

not impossible, burden of persuasion with this argument, since courts are reluctant to read more benefits into an ERISA plan than its plain language confers. *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993); *Howe*, 896 F.2d at 1110; *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812, 816 (8th Cir. 1988), *vacated and remanded on other grounds*, 489 U.S. 1049 (1989).

II. The Collective Bargaining History.

The express terms of an ERISA plan determine the benefits it confers. But the plans at issue were appendices to collective bargaining agreements, and it is usually unwise to construe collective bargaining agreements without regard to their bargaining history. Therefore, before examining the relevant Master Agreement provisions, we will review the negotiating history of those Agreements as it relates to retiree health benefits.

Prior to 1976, Morrell and the Union bargained the issue of health care benefits for retired employees and expressly included such benefits in the Master Agreements. For example, Appendix F to the 1973 Master Agreement provided:

> 8.12 Retirement: *All retirees currently furnished . . . coverage and* all Employees who retire during the term of the Master Agreement shall be furnished hospital, medical and surgical insurance at Company expense through a plan as provided by the Company.

(Emphasis added.) The 1973 Master Agreement also contained a term clause expressly limiting the duration of the Appendix F benefits:

> 103. The Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of this Agreement.

Each subsequent Master Agreement contained a similar term clause, as well as a general clause limiting the dura-

tion of all the Master Agreement's provisions to its three-year term.

The parties changed § 8.12 of Appendix F in the 1976 Master Agreement by deleting the reference to "All retirees," so that Morrell's only express undertaking was to provide continuing health benefits for employees who would retire during the term of that Master Agreement. The district court attributed this change to the Supreme Court's decision in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), that bargaining for retired employees is a permissive rather than a mandatory subject of collective bargaining. Relying on *PPG*, Morrell took the position in 1976 that previously retired hourly employees were no longer members of the bargaining unit, and the Union acquiesced.

Although the 1976 Master Agreement did not refer to past retirees, the parties negotiated the subject of retiree health benefits. In January 1977, Morrell announced that retired hourly employees would be provided improved health benefits, including a new cost reduction plan for prescription drugs and some Medicare reimbursement. These changes were made retroactive to the effective date of the 1976 Master Agreement, and Morrell subsequently represented to this court that they were made "as a result of union negotiations." [4]

In 1979, Morrell and the Union negotiated another Master Agreement. Again, health benefits for retirees were discussed but not included.[5] Instead, Morrell and the Union signed a July 12, 1979, "side letter" reciting

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[4] This quote is taken from page five of Morrell's March 21, 1986, brief in *Anderson v. John Morrell & Co.*, No. 86-5017-SD, later reported at 830 F.2d 872 (8th Cir. 1987).

[5] For example, the 1979 Master Agreement provided that union employees who retired after September 1, 1979, would be covered under Morrell's Vision Plan. This benefit was not extended to previously retired hourly employees until January 1, 1984.

that Morrell has no duty to bargain retiree benefits but "has advised the Union that, as a matter of Company policy, the Company intends to announce that effective September 1, 1979, the Company will extend the following benefit programs to retirees currently covered by a Company H.M.S. Plan." When the 1979 Master Agreement became effective, Morrell wrote existing retirees that it was "pleased to announce an improvement" in their health care benefits. Lee Bishop, who negotiated the 1979 Master Agreement with the Union, testified that Morrell made a significant change to retiree health benefits in 1979:

> Prior to this time . . . Morrell had engaged in what I would refer to as stairstep programs for past retirees. In other words, if you retired [in] 1969, you got one set of benefits; and if you retired in 1973, you got a differen[t] set of benefits . . . . so that we had multiple plans in existence for past retirees. The company's determination was . . . that we would discontinue the stairstep approach and put all the past retirees under the same program.

Although Bishop described these as unilateral changes, Morrell's brief to this court in *Anderson v. John Morrell & Co.*, stated, "In 1979, as a result of union negotiations, the Company once again retoractively improved the benefits available to union retirees."

When the 1979 Master Agreement expired in 1982, the Union went on strike. Morrell terminated health care benefits for the strikers but continued to pay benefits to hourly retirees. After the parties negotiated a new collective bargaining agreement, Morrell reopened negotiations when a major competitor obtained wage and benefit concessions from the Union. In late 1983, the Union accepted lower wages and benefits from Morrell as well, reflected in a new Master Agreement made retroactive to September 1, 1982. Once again, Appendix F provided retirement benefits only for employees who retired during

the life of the Agreement.[6] However, on January 12, 1984, Morrell sent past hourly retirees a letter stating in part:

> During these negotiations with the Union, the parties agreed that no reductions would be made in retiree pensions.[7] However, the Company and the Union did agree that your retiree medical benefit program will be modified to provide the same general level of benefits negotiated for active employees for those benefits applicable to retirees. . . . Benefits have been improved in some areas, particularly as it relates to catastrophic type illnesses. On the other hand, the deductibles and co-insurance have been modified so that you will share in some of the costs covering initial treatments and minor ailments.
>
> * * * *
>
> John Morrell & Co. is pleased to be able to continue to provide retirees with a medical benefits plan.

Morrell also sent retirees a Summary of Hourly Retiree Medical Benefit Program that stated, "This Benefit Program is subject to modification and termination in accordance with applicable law."

When the 1982 Master Agreement expired on September 1, 1985, the Union again went on strike, and Morrell again stopped paying health benefits to striking employees while continuing them for hourly retirees. In the subsequent 1985 Master Agreement, Appendix F made no mention of past retirees, and, like its predecessors, was limited to the duration of the three-year Master Agreement.

---

[6] A 1983 Memorandum of Agreement stated that "present retirees . . . shall be covered" by Appendix F. The district court found that this referred to employees who retired after the 1979 Agreement expired but before the 1982 Agreement was negotiated.

[7] A disingenuous statement since pension benefits are vested by law under ERISA.

In 1987, the Union again went on strike. When the parties negotiated to an impasse in early 1989, Morrell unilaterally implemented new wage and benefit terms. A new collective bargaining agreement went into effect in January of 1991. Morrell sent a memorandum to hourly retirees on March 31, 1991, that included the statement, "The Company reserves its legal right, at its sole discretion, to alter, modify, or terminate any plan or benefit at any time." The Union responded that any such action "would violate the Union's applicable collective bargaining agreement as well as the rights of the retirees." Morrell then commenced this action.

On appeal, each party strives to put a favorable gloss on this long collective bargaining history. Morrell argues that, since 1976, it has carved past retiree health benefits out of the collective bargaining process and treated them as a matter of "employer grace." But as the above-quoted passages from Morrell's brief to this court in *Anderson v. John Morrell & Co.* make clear, the health benefits Morrell provided to hourly retirees prior to April 1, 1989, were in fact the product of collective bargaining. They were not included in the Master Agreements, and perhaps they were not collectively bargained in a narrow sense of that term. But as each Master Agreement was negotiated, the Union made requests for improved retiree health benefits, Morrell devised and presented a detailed array of health benefits it would provide to past retirees "as a matter of company policy," and the Union acquiesced in Morrell's proposal, either by signing a document like the July 12, 1979, side letter, or by its silence. As Morrell negotiator Lee Bishop admitted at trial, Morrell was aware that it would be harder to negotiate a new Master Agreement for the active employees if the Union was upset with the Company's treatment of past hourly retirees.

On the other hand, the Union's view of the collective bargaining landscape is even more distorted. The Union

recognizes that the Master Agreements after 1973 made no mention of past retirees and therefore cannot be construed as providing vested benefits to already retired hourly employees. The Union instead argues that each retiree has a vested right to the level of retirement health benefits afforded in the Master Agreement in effect when he or she retired. But that view of the Master Agreements does not square with the parties' bargaining history.

In every negotiation after 1973, the Union requested improved health benefits for past retirees. Starting in 1979, Morrell eliminated its prior "stairstep" approach—which on its face was consistent with the Union's vesting argument—and adopted, with at least implicit Union approval, a single health benefits package applicable to all past retirees. Thereafter, prior to the signing of each new Master Agreement, Morrell and the Union negotiated, and Morrell subsequently implemented, a modified health benefits package for past retirees. As Morrell's January 12, 1984, letter to retirees illustrates, the modifications included both increases and decreases in the level of benefits, yet neither the Union nor any member of the Class ever objected that such changes violated vested rights.[8]

Faced with this inconsistency at oral argument, the Union suggested that each subsequent modification is part of the retirees' vested benefits. But those modifications were the product of either side deals or unilateral Morrell action, depending upon one's views of the collective bargaining. They are not to be found in the Master Agreements, which are the basis of the Union's vesting claims. In short, there is no basis for concluding that

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[8] Even if a union collectively bargains benefits for past retirees, "vested retirement rights may not be altered without the pensioner's consent." *PPG*, 404 U.S. at 181 n.20. Morrell's modified retiree health benefit plans were never submitted to past retirees for approval, which suggests that neither Morrell nor the Union thought they were modifying vested benefits.

later modifications to a retiree's initial level of health benefits are vested. Rather, the fact that modifications were routinely negotiated is fundamentally inconsistent with the notion that *any* retirement health benefits were *ever* vested. *See Anderson v. Alpha Portland,* 836 F.2d at 1519.

For the foregoing reasons, we conclude that the history of collective bargaining between Morrell and the Union does not support the Union's claims that hourly retirees' health benefits are vested. With that background, we turn to the provisions of the Master Agreements as construed by the district court.

III. The Master Agreement Provisions.

The Master Agreements contain many provisions that reflect an intent to confer only non-vested retiree health benefits.

1. The absence of any explicit vesting language in Appendix F is strong evidence of the parties' intent to limit retiree benefits to the term of the Master Agreement. By contrast, the pension benefits in Appendix G were expressly referred to as vested.

2. As noted above, each Master Agreement contained a term clause expressly limiting the duration of the retirement health benefits contained in Appendix F to the duration of the Master Agreement. We held in *Anderson v. Alpha Portland Industries* that similar language was inconsistent with an intent to vest health benefits for life: "[i]t would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date." 836 F.2d at 1519; *see also Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir.) (en banc) ("employers adamant against assuming perpetual obligations can eliminate all doubt by insisting on a clause that makes any entitlement to health benefits granted by the

agreement expire on the date the agreement expires"), *cert. denied*, 114 S. Ct. 291 (1993).

3. The provision in the 1973 Master Agreement that continued health benefits for past retirees is evidence that prior benefits were not vested. *See Anderson v. Alpha Portland*, 836 F.2d at 1518-19; *DeGeare*, 837 F.2d at 816. Likewise, as noted above, Morrell's "unilateral" adoption of a modified health benefits package for past retirees with the signing of each new Master Agreement is evidence that prior benefits were not vested.

4. Appendix F in several of the Master Agreements contained a coordination-of-benefits provision. We have held that such provisions are also inconsistent with vesting. *See Anderson v. Alpha Portland*, 836 F.2d at 1519.

In the face of this substantial textual evidence that retiree health benefits are not vested, the Union points to relatively little in the Master Agreements to the contrary. First, the Union refers us to § 9.1(b) of Appendix F to the 1979 Master Agreement, a provision that also appeared in the 1982 and 1985 Agreements:

> (b) After Retirees Death:
>
> * * * *
>
> (2) When a Retired Employee dies who has selected a joint and survivor form of pension, the above coverage shall continue for the surviving spouse and dependent children until the earlier of the surviving spouse's death or remarriage . . . .

The Union argues that this language expressly vests an eligible spouse with Appendix F retirement health benefits until the spouse's death or remarriage. We have previously noted that such language does support the argument that eligible survivor benefits are vested. *See Local Union No. 150-A, United Food & Commercial Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985). But in the context of this case, it is equally plausible to construe this provision as providing

that a surviving spouse who is eligible to receive a joint and survivor pension—which is vested—will also receive whatever non-vested retiree health benefits Morrell provides from time to time. Under this provision, the eligible surivor receives only the "above coverage," which is limited to the three-year term of Appendix F and the Master Agreement. Thus, § 9.1(b) is ambiguous and cannot overcome the other provisions, such as the term clauses, that are inconsistent with vesting.

Next, the Union relies upon two additions to Appendix F in the 1982 and 1985 Master Agreements. First, the preamble to Appendix F in those Agreements stated: "This Agreement . . . other than as provided under Section B [the retirement benefits section], shall be subject to termination, modification or extension upon the termination of [the] Master Agreement." That language, the Union argues without supporting trial testimony, vested all the retirement health benefits contained in Section B. But there is no general reference to vesting in Section B. Rather, there is one specific provision—Article III—that conferred fixed five-year health benefits on "Separation Retirees," workers between the ages of 50 and 54 who elected a separation pension after a plant closing. Absent extrinsic evidence to the contrary, we believe that the preamble's exception—"other than as provided under Section B"—was simply a cross reference to the limited vested retirement health benefits conferred in Article III of Section B.

Second, the Union finds an intent to vest retirement health benefits in § 4.1 of Section B in the 1982 and 1985 Agreements:

> 4.1 The above retirement benefit plan was based upon certain economic conditions in existence at the time such plan was negotiated by the Company and the Union. Therefore, the Company and the Union reserve the right to subsequently alter, modify, increase or reduce the benefits and coverages provided herein, at any time, including subsequent to the

> Employee's retirement date, if changes occur in the costs of this retirement benefit, or if economic conditions of the meat industry or the Company change, but any modification to the plan shall be only upon mutual agreement by the Company and the Union.

The Union construes § 4.1 as meaning that the Union must agree to any modification of retiree health benefits, even after the Master Agreement has expired. Even accepting the Union's interpretation of this provision, it is further evidence that both Morrell and the Union recognized that retirement health benefits were subject to periodic modification, a recognition inconsistent with the Union's contention that each Master Agreement conferred vested benefits. Moreover, Morrell's uncontroverted trial testimony gave § 4.1 a very different meaning—it was an exception to a Company concession not to reopen these Master Agreements prior to their expiration. In other words, § 4.1 was an express recognition by the Union that retirement health benefits could be the subject of additional negotiations *before* the Master Agreements expired.

From the above, we conclude that both the plain meaning of the Master Agreements, and the collective bargaining context in which they arose, support the district court's determination that the Class's retirement health benefits are not contractually vested.

IV. Morrell's Fiduciary Duty.

Finally, the Union argues that even if the Class does not have vested retirement benefits, Morrell would violate its fiduciary duties under ERISA by unilaterally modifying or terminating those benefits. This argument is without merit. ERISA does not bar an employer that is also a fiduciary from exercising its business judgment to modify non-vested welfare benefits. *See United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386-87 (8th Cir. 1992).

The judgment of the district court is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

I agree that vesting is not mandatory under ERISA for employee welfare benefit plans. I also agree that the Union waived its right to compel arbitration. My agreement ends there, however. The Union does, of course, have the burden of proving that the employee welfare benefits were contractually vested, but this burden is no greater and no less than in any other contract case. *See Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Local Union No. 150-A, United Food & Commercial Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985). In my view, the Union has more than sustained its burden. Thus, I respectfully dissent.

The Collective Bargaining History

The single most powerful, undisputed fact in this record is that every hourly employee who retired between 1957 and January 1, 1989, received health benefits from Morrell from the time of retirement until death. The retirees received these benefits without interruption even though the collective bargaining agreement terminated on several occasions during this period and even though the Union went on strike on some occasions. The health benefits did change from time to time, usually to the benefit of the retirees, during the forty-two-year period, but always by agreement between Morrell and the Union. No retiree complained about the changes that were made.

A second undisputed fact is that, upon retirement, each hourly employee was given the option of selecting a joint survivor form of benefits. Upon the death of a retiree who elected joint survivorship benefits, Morrell informed the surviving spouse that health benefits would continue until the spouse died or remarried. Jt. App. 823, 919 (§ 9.1(b)(2) of Appendix B of 1979 Master

Agreement), 946. Larry McFarland, a retired employee of Morrell, testified that "I was told by [LaVonne Hoffman, Butch Anderson, Gary Junso, and Tim Sinsky] that I would have the benefits for the rest of my life as well as at the time of my death. If I left the percentage in there for my wife, she would receive the benefits for the rest of her life." *Id.* at 590. In his affidavit dated April 21, 1992, Les Sundermann, another retired employee of Morrell, stated:

> I selected a joint and survivor pension option because I knew that this form of pension would guarantee medical insurance for my wife after my death. . . . [T]he form given to me to take home and fill out . . . also said at the bottom that my wife would have the health insurance after my death if I selected the joint and survivor option.

Id. at 1733. Another retired employee of Morrell, Bob Smelser, stated in his affidavit dated April 20, 1992, as follows:

> I chose an optional form of pension (joint and survivor pension) specifically so that my wife would be covered by the benefits after my death. The outline of the pension options which I received in the mail from the Company contained a statement, in large capital letters at the bottom, as follows:
>
> > HEALTH INSURANCE BENEFITS FOR YOUR SURVIVING SPOUSE WOULD BE PROVIDED BY THE COMPANY ONLY IF YOU CHOOSE A JOINT AND SURVIVOR PENSION.

Id. at 1741. In addition, Paragraph F of a form entitled "Retirement Information" states that "[f]or continued health care benefits for an employee's spouse and dependents beyond the life of the retiree, employee must select a Joint & Survivor Form of Pension." *Id.* at 1743; *see also* Trial Testimony of Rodger Tibke, *id.* at 601;

Affidavit of Francis Krier (Apr. 20, 1992), *id.* at 1749; Affidavit of George Zuraff (Apr. 21, 1992), *id.* at 1752. Again, it is undisputed that Morrell continued these spousal benefits without interruption during those times that the union employees were on strike and on collective bargaining agreement was in effect.

A third undisputed fact is that not once during the period from 1957 through December 19, 1985, did Morrell inform the Union, the active employees, or employees about to retire that it had the right to terminate retiree health benefits. In his affidavit of April 21, 1992, Jim Jarman, a retired employee of Morrell, states:

> Neither Lavonne Hoffman or any other person ever advised me that my pension was guaranteed and fixed but that my health insurance benefits were not. I have never at any time heard any representative of John Morrell & Co. make that statement or any statement that the health insurance benefits for employees who have retired are not guaranteed, fixed, and vested in accordance with the agreements between Morrell and the UFCS Union.

Id. at 1729. Another retired employee of Morrell, Jerry Nelson, stated in his affidavit of April 20, 1992, that "[n]o one told me that my health benefits were not guaranteed, fixed or vested and no one ever told me that it was the Company's position that those benefits could be modiefid or terminated by the Company. In fact, I have never at any time heard any representative of the Company make such a claim." *Id.* at 1736; *see also* Affidavit of Don Reiter (Apr. 23, 1992), *id.* at 1738; Affidavit of Ronald Christianson (Apr. 21, 1992), *id.* at 1758; Affidavit of Marcene Williscroft (Apr. 21, 1992), *id.* at 1763. Indeed, it was not until July 12, 1979, that Morrell intimated that health benefits for employees and retirees was a matter of "employer grace" rather than a matter of contract. On that date Morrell wrote to the Union:

> The Company has taken the position that it has no legal obligation to bargain with the Union with respect to the benefits of past retirees.
>
> *Without any waiver of the legal position of either party, however,* . . . the Company will extend the following benefit programs to retirees currently covered by a Company H.M.S. Plan and who have retired prior to September 1, 1979, under the [retirement provisions] of the 1957, 1959, 1961, 1964, 1967, 1970, 1973, and 1976 Supplemental Agreements on Pensions.

Id. at 932 (emphasis added). By the terms of this letter, which the Union signed and accepted, the Union fully preserved its legal position that no changes could be made in the health benefits of currently retired employees without its consent.

A fourth undisputed fact is that all during the years in question, health benefits for active and retired employees alike were the subject of negotiations between Morrell and the Union. Although it is true that after the Supreme Court's decision in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), Morrell was not legally required to bargain with the Union over retiree health benefits, it is equally true that it did bargain over this issue and it must keep the bargain it made. Even Morrell's chief negotiator, M. Lee Bishop, conceded that "it was in the company's best interests to provide past hourly retirees with certain benefit improvements. And it related largely to the contract negotiations that were going on at that time." Jt. App. 1712. Simply stated, retiree health benefits were an element, along with wages, hours, pensions, and other fringe benefits, to be considered in reaching an agreement.

A fifth fact is that many employees testified that they were told at the time of their retirement that their health benefits would be continued until they died and beyond

that for their spouses if they elected joint survivorship benefits. The following colloquy between the attorney for the Union and Virgil Grace, a retired Morrell employee, during the trial of this matter illustrates what Morrell supervisors told employees about their retiree health benefits:

> Q. (By Mr. King) Go ahead. What else was said?
>
> A. And I decided to take it all and [Bob Worcamp] explained to me that, "Do you know what you are doing?" And I says, "I hope that I do; I think that I do." And I asked for what I was going to get in fringe benefits. He handed me a piece of paper and says, "Read that on the back." And it said that if I took it all, my wife wouldn't get anything and she would lose all of her insurance plus the PCS if I passed away. And if I took partial—part of it she would get those for the rest of her life if I passed away.
>
> Q. She would get what for the rest of her life?
>
> A. The insurance, health benefits, and the PCS. And I said that—after I read it, and it said that I would get my insurance and PCS for the rest of my life, I said that I questioned that and wanted to be sure that I knew what I was getting because in our condition—she has had rheumatoid arthritis for 17 years, and I have arthritis, and we are both in tough shape, and I wanted to be sure and clarify that, that if this—if there was any way that I could lose that health insurance. He said, "The only way you can lose that health insurance is if the company went belly up and went broke." I said I'd just wanted to clarify that because I believe a person is only as good as their word.

Id. at 595-96. Don Sinning, another retired employee of Morrell, stated in his affidavit of April 21, 1992, that

"Lavonne Hoffman told us that if I did select a Joint and Survivor form of pension, my wife and I would both be covered by the health benefits during my lifetime and thereafter my wife would be continued to be covered until the end of her life." *Id.* at 1754; *see also* Affidavit of Ronald Christianson (Apr. 21, 1992), *id.* at 1758. Not a single witness for Morrell testified that retirees were told at the time of retirement that Morrell could terminate their health benefits at the expiration of a collective bargaining agreement.

Lavonne Hoffman, the Assistant Manager of Benefits for Morrell in Sioux Falls, South Dakota, submitted an affidavit in which she stated that "it was our standard practice to advise [retirees] that their pensions were guaranteed and fixed, but their [health] benefits were not." *Id.* at 1723. Hoffman did not state that she explicitly advised employees that Morrell reserved the right to terminate the retiree health benefits after retirement. Morrell did not call a single retiree to support Hoffman's statement that retiree health benefits were not guaranteed, nor did Hoffman herself identify any retiree whom she told that health benefits were not guaranteed.

In sum, the record supports the view that both the Union and Morrell intended that health benefits would vest when an employee retired. The retirees knew that health benefits could be modified by Morrell and the Union, but they also knew that it was an article of faith with the Union that the health benefits of retirees would be protected.

Faced with hard times in the intensely competitive meat industry, Morrell's position began to change in 1984. On December 19, 1985, Morrell stated in a letter to a retiree that "benefits are subject to change." *Id.* at 1180. Enclosed with the letter was a summary of retiree health benefits that stated, "This Benefit Program is subject to modification and termination in accordance with applicable law." *Id.* at 1182. Note that Morrell does not

explicitly claim that it has the unilateral right to change retiree health benefits. In fact, Morrell was obligated by contract not to do so.

On November 16, 1989, Morrell wrote all retirees a self-serving letter in which it stated that "as always the Company reserves the right to change health care benefits from time to time." *Id.* at 1251. This letter was followed by others in a similar vein in which Morrell's position hardened, culminating in its decision on December 7, 1991, to continue coverage for all retirees but largely at the retires' expense.

In the face of this history of collective bargaining and representations to individual retirees, I am unable to find any support in the record for the majority's view that the history of collective bargaining indicates that retiree health benefits could be terminated by Morrell unilaterally. Obviously Morrell retained the right to deny health benefits to future retirees, but it did not have the right to terminate the health benefits of already retired hourly employees.

The Master Agreement Provisions

I cannot agree with the majority that the Master Agreements contain many provisions that reflect an intent to confer only nonvested retiree health benefits. To the contrary, the agreements failed to include a single provision that informed the Union, the active employees, or the retirees that the four-decade practice of providing health benefits could be discontinued at the end of any collective bargaining agreement.

In my opinion, there are two reasons Morrell never told the interested parties that it retained the right to terminate retiree health benefits at the end of a collective bargaining agreement. First, Morrell knew that it had no right to do so, and only asserted this purported right when conditions in the industry became difficult. Second,

Morrell knew that its assertion of such a right after more than forty years of give-and-take bargaining involving this issue would certainly trigger a work stoppage. Morrell had a perfect opportunity to assert the right to unilaterally terminate health benefits for retirees in 1971 when *Pittsburgh Plate Glass* was decided by the Supreme Court. It failed to do so and instead continued to bargain with the Union with respect to retiree health benefits and to honor retirees' health benefit claims without interruption.

The majority next claims that this court held in *Anderson v. Alpha Portland* that language similar to that used here limited retiree health benefits to the duration of the Master Agreement and that such language is inconsistent with an intent to vest retiree health benefits. There are at least two responses to this claim. First, the language here is identical to that in *Dubuque Packing*, in which our court held that contract language plus a course of dealing indicated an intent that the right to health benefits vest upon retirement. We stated:

> While the agreements are not unambiguous, we believe plaintiffs have carried their burden of proof. As noted previously, there are many indications in the agreements and course of dealing that the parties intended the right to benefits would vest upon retirement. The right to receive health and welfare benefits arises from the retiree's status as a past employee. It is not dependent on a continued or current relationship with the Company. The status of a retiree cannot be affected by future negotiations or agreements between the Company and the Union; neither can act on behalf of retirees. There is simply no evidence that the Company and the Union did not intend to vest the right to benefits in the retirees. There is, on the other hand, evidence that the parties implicitly intended to provide lifetime benefits to retirees.

Dubuque Packing, 756 F.2d at 70. This panel has no right to overrule *Dubuque Packing*; only this court en banc can take that action.[1]

Second, the facts in *Anderson v. Alpha Portland* are clearly distinguishable from our case.

1. In *Anderson v. Alpha Portland* both the union and the company testified that retiree health benefits were not guaranteed beyond the life of the current collective bargaining agreement. The International Union president, Thomas Miechur, and Alpha Portland personnel manager, Robert J. Bonstein, "testified that under the language they prepared and agreed upon, retiree welfare benefits were not guaranteed beyond the expiration of the CBA." *Anderson v. Alpha Portland*, 836 F.2d at 1515. Here the Union has always taken the position that retiree health benefits are guaranteed for life, and Morrell acceded to that position for many years.

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[1] Dubuque Packing Co. made the same argument to this court as is being made by Morrell.

> Plaintiffs' analysis of selected portions of contractual language simplistically and, at times, fancifully, suggests that the parties clearly intended to provide retiree health benefits beyond the terms of the relevant collective bargaining agreements. The retiree benefit provisions of the subject agreements quite simply contain coverage and eligibility provisions which are applicable during the contract term. Due to the absence of language specifying that such benefits shall survive the contract term, they are subject to the general durational provisions of the agreement. Plaintiffs fail to suggest why parties who are manifestly capable of clearly indicating their intention with respect to the termination of rights and obligations were unable to specify that rights shall not terminate with the agreement in the context of retiree welfare benefits. Instead, Plaintiffs would have this Court believe that the contract provisions specifically describing the *coverage* of these welfare benefits also prescribes their duration.

Dubuque Packing Co. Reply Br. 4-5.

2. Alpha Portland *unilaterally* created a group insurance plan for active employees in 1946 and extended the plan to retirees in 1984. Here Morrell and the Union *negotiated* the health plan for both active and retired employees.

3. Beginning in 1955 the terms of the Alpha Portland plan became subject to bargaining between the company and the union. The booklet describing the initial negotiated plan stated that Alpha Portland reserved the right to *discontinue* the plan. No such language appeared in Morrell's booklet until 1985.

4. In 1965 the union submitted a proposal to Alpha Portland that retiree benefits be paid to a retiree's spouse after the retiree's death, but Alpha Portland rejected it. Here, spouses of Morrell retirees who elected the joint option received health benefits until they died or remarried.

5. In *Alpha Portland* benefits for both strikers and retirees continued during the strike. This court stated, "The fact that Alpha treated retirees and striking employees equally negates any inference of intent to vest retiree benefits." 836 F.2d at 1518 n.3. In contrast, when strikes occurred at Morrell, the health benefits of striking employees were discontinued but health benefits for retirees continued.

The majority makes two additional arguments. First, it states that the durational clause limits all benefits to the life of the collective bargaining agreement. This argument was considered and rejected in *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Yard-Man* the collective bargaining agreement provided that active employees' benefits terminated one month after an employee's layoff. Thus, the benefits of all active employees terminated on plant closure. The company ar-

gued that retirees' benefits could thus be terminated at plant closure or with the expiration of the collective bargaining agreement. The court looked to the conduct of the company in determining what the parties intended. It noted that Yard-Man had continued retirees' insurance benefits for a time after plant closure beyond the point where such benefits could have been terminated for active employees. It stated that this conduct indicates that the company "did not consider retiree benefits to be tied to the durational limitations of that active group." *Id.* at 1481. The court went on to say:

> Benefits for retirees are only permissive not mandatory subjects of collective bargaining. As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. The employees are presumably aware that the union owes no obligation to bargain for continued benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. Contrary to Yard-Man's assertions, the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernable way, inconsistent with federal labor law.

Id. at 1482 (citations omitted). Here, retiree health benefits were continued during strikes while active employees' health benefits were not.

Second, the majority asserts that "the fact that modifications were routinely negotiated is fundamentally inconsistent with the notion that *any* retirement health benefits were *ever* vested."[2] While I agree that later

[2] In III.3., the majority states that Morrell's unilateral "adoption of a modified health benefits package for past retirees with the

modifications *may* be evidence of an intent not to vest, I believe that the evidence of intent in this case is overwhelmingly to the contrary. Most of the changes in benefits were favorable to the retirees or were made to coordinate benefits with newly enacted Medicare. The mere fact that there were subsequent negotiated modifications to retiree health benefits does not prove that such benefits did not vest at the level in effect when the employee retired. Rather, all it indicates is that retirees did not necessarily have any incentive to object to modifications of their benefits if the changes increased their benefits or if the changes were otherwise viewed as beneficial because they contributed to Morrell's long-term prosperity.

During the forty-plus years of negotiations between Morrell and the Union not a single retiree objected to the changes that had been negotiated by Morrell and the Union. If an individual retiree believed that his vested right to health benefits had been diminished, that retiree had a right to commence an action under section 301 of the Labor Management Relations Act to assert his right to receive the benefits that existed at the time of his retirement.[3] Benard J. Aning, a retired employee of Morrell, personally and as a representative of the defend-

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signing of each master agreement" is evidence that prior benefits were not vested. In fact, Morrell did not unilaterally adopt a modified health benefit package for past retirees with the signing of each new master agreement. In every case until the very end, the benefits package for retirees was negotiated by Morrell and the Union.

[3] The Court in *Pittsburgh Plate Glass* stated:

> This does not mean that when a union bargains for retirees —which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.

404 U.S. at 181 n.20 (citations omitted).

ant class, is a party to this action. Prior to this action, no retiree had commenced an action to challenge any of the negotiated changes to the retiree health plan.

Conclusion

For four decades Morrell and the Union negotiated retirees' health benefits. In 1991, for economic and competitive reasons, Morrell decided to charge retirees for health benefits. Were it not for its bargain with the Union to continue to provide health benefits to retirees, it would have a right under ERISA to make that change. Morrell certainly had the right to make this decision with respect to future retirees, but not with respect to employees who had already retired. Morrell made the bargain, and no court may refuse to enforce this bargain, which was entered into freely and which cost active employees higher wages and better working conditions, which they agreed to because they were concerned about hospital and medical bills for themselves and their spouses after they retired.

I dissent not because I feel sympathy for the retirees, although I do, and not because I question that the meat packing industry is an intensely competitive one, but simply because a bargain is a bargain, and we should not absolve either party from their bargain. I would reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

[Filed Jun. 24, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 91-4184

JOHN MORRELL & CO.,

Plaintiff,

vs.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, and BENARD J. ANING, personally and as a representative of a defendant class of others similarly situated,

Defendants.

MEMORANDUM OPINION

John Morrell & Co. ("Morrell") brought this action under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* It seeks a determination that it is entitled to unilaterally modify or terminate programs of health benefits provided to its retired hourly employees. Defendants UFCW and Benard J. Aning allege that the changes in the retirees' health benefits constitute breaches of Morrell's fiduciary duties as defined by section 404 of the Employee Retirement Income Security Act of 1974 ("ERISA"). They further claim that Morrell has dealt with assets of the ERISA plan in its own interest in violation of section 406 of ERISA, 29 U.S.C. § 1006.

This Court has jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, section 301 of the Na-

tional Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §§ 158 and 185, sections 502(a) and 502(e) of ERISA, 29 U.S.C. § 1132, and 28 U.S.C. § 1337.

The issue before the Court is whether Morrell has a unilateral right to change or terminate the health benefits for retirees who retired before April 1, 1989. Exhibit 36b sets forth the intention of Morrell.

Morrell contends that the retiree Health, Medical, and Surgical ("H.M.S.") benefits do not continue beyond the expiration of the collective bargaining agreement ("CBA") under which each retiree retired. Morrell asserts its contractual obligation to provide the same benefits bargained for in the CBA terminated when the CBA expired. It further alleges that these benefits are not "vested" lifetime benefits, and therfore, they may be changed unilaterally. Finally, Morrell contends that even if the benefits are lifetime benefits which cannot be unilaterally changed by Morrell, the benefits can be changed by agreement between Morrell and UFCW. Therefore, Morrell requests the Court to order the parties to negotiate in good faith on the proposed health benefits changes for retirees.

A court trial was held on October 6, 1992. The Court submits the following findings of fact and conclusions of law, some of which were stipulated on October 5, 1992 (Docket #103). Reference to facts which have been stipulated will be noted as (Stip. —).

FINDINGS OF FACT

a. Background

1. Morrell is a Delaware corporation with its principal place of business in Cincinnati, Ohio. (Stip. C-1). It currently owns and operates meat-packing plants in Sioux Falls, South Dakota, and other locations. At various times relevant to this action, it owned and operated plants covered by a master agreement between the parties

in Sioux Falls, South Dakota; Estherville, Iowa; Ottumwa, Iowa; Fort Smith, Arkansas; Arkansas City, Kansas; St. Paul, Minnesota; East St. Louis, Illinois; El Paso, Texas; Memphis, Tennessee; and Cincinnati, Ohio. All of those plants are now closed except the plant in Sioux Falls. (Stip. C-5 & C-6).

2. Morrell is an "employer" under section 2(2) of the NLRA, 29 U.S.C. § 152(2). (Stip. C-2).

3. United Food and Commercial Workers International Union, AFL-CIO ("UFCW") is a "labor organization" under section 2(5) of the NLRA, 29 U.S.C. § 152(5) with its principal offices in Washington, D.C. (Stip. C-3 & C-4). UFCW is engaged in representing employees in the district of South Dakota and has for many years been the recognized collective bargaining representative of Morrell hourly employees.

4. Defendant Benard J. Aning ("Aning") is a retried hourly employee of Morrell's Sioux Falls plant who was formerly represented by the UFCW. He has been furnished with health care benefits by Morrell, first as an active employee and currently as a retiree. (Stip. C-7).

5. Aning is a representative of the certified class.[1] As of December 17, 1991, it contained over 3,300 former hourly employees. (Stip. C-9).

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[1] Prior to trial the parties stipulated to a defined class for certification which provided that the class consists of the following persons who are now, and in the past have been, provided health care benefits by Morrell:

(i) "Retirees"—persons who were formerly employed by Morrell as hourly employees at various plants and represented by the UFCW, but who retired on or before April 1, 1989.

(ii) "Spouses"—wives or husbands of living Retirees.

(iii) "Surviving Spouses"—widows and widowers of Retirees who selected a joint and survivor form of pension and widows

6. The retiree class is a closed class and the number of persons in the class is declining through death at a rate of approximately 200 per year.

7. Morrell and UFCW (or its predecessor unions) have throughout the past forty years been parties to successive CBAs commonly referred to as "master agreements." The history of these CBAs evidences some variance as relates to retirees and H.M.S. benefits.

8. UFCW (or its predecessor unions) has also been a party to similar master agreements with other major meat-packing employers such as Armour and Company, Swift & Company and Wilson Foods Corporation. UFCW and the meat-packing employers (including Morrell) engaged in what is commonly known as "pattern bargaining." In each round of negotiations, one meat-packing company and UFCW would reach an agreement which would "set the pattern" for the meat-packing industry, and the other companies would then adopt the same provisions as a means of equalizing labor costs. This pattern bargaining resulted in the same wages and benefits and working conditions for all employees and retirees in the meat-packing industry.

9. Successive CBAs became effective on September 1, 1973, 1976, 1979, 1982, and 1985. Each of these CBAs contained an Appendix F which detailed health benefits for Morrell's hourly employees and persons re-

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and widowers of hourly employees who died with twenty years of credited service.

(iv) "Other Dependents"—children of Retirees within specified ages or children (of the same ages) of deceased Retirees who selected a joint and survivor form of pension.

(Stipulation for class certification, Docket #104). The Court approved this stipulation and certified the class in open court (Tr. 4).

tiring during its term. These CBAs covered the labor contract relations at the Sioux Falls plant.

b. Relevant Provisions of the CBAs

10. *1970-73 CBA* (April 4, 1970, to September 1, 1973), (Exhibit 55).

The parties to the 1970-73 CBA were Morrell and the Local P-1 Amalgamated Meat Cutters and Butcher Workmen of North America A.F.L.-C.I.O. (predecessor of UFCW).

Referring to an earlier CBA terminating August 31, 1964, paragraph 8, page 37, provided:

> The H.M.S. benefits . . . shall continue to be made available to present covered retirees who have been carrying such insurance . . . at no additional cost over the amounts being paid as of the date of execution of this Memorandum by retirees for such insurance coverage at the respective plants. All retirees who are carrying such insurance coverage as of December 1, 1967, and all Employees retiring after December 1, 1967, shall be furnished such insurance thereafter at Company expense.

Thus by contract, in 1970 the retirees were included by specific contract provisions. This status of retirees was to change later.

11. *1973 CBA* (September 1, 1973-September 1, 1976), (Exhibits 1a and 1b).

Retirees continued to receive by contract H.M.S. benefits under this CBA.

Paragraph 8.12, Exhibit 1b, page 24, provided:

> 8.12 Retirement: All retirees *currently furnished H.M.S. coverage* and all Employees who retire dur-

> ing the term of the Master Agreement shall be furnished hospital, medical and surgical insurance at Company expense . . . .

(Emphasis supplied.) Paragraph 8.12 further changed benefits which had been provided in the 1964 agreement by (1) providing coverage of 120 days per confinement; (2) increasing miscellaneous fees to $500; (3) providing coordination with Medicare; and (4) providing conditions of coverage for those employees ages 53 and 54 who elect a separation pension.

The 1973 CBA contained a duration clause on H.M.S. benefits as follows:

> XXXI
>
> HOSPITAL-MEDICAL-SURGICAL INSURANCE
>
> 103. The Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of this Agreement.

(Exhibit 1a, page 50).

12. *1976 CBA* (September 1, 1976-September 1, 1979), (Exhibits 2a and 2b).

Paragraph 8.12, Exhibit 2b, page 25, omitted the reference to "all retirees currently furnished H.M.S. coverage" as found in the 1973 CBA paragraph 8.12 and read in part as follows:

> 8.12 Retirement: All Employees who retire on or after September 1, 1976 . . . shall be furnished at Company expense effective as of the time of retirement, the following: . . .

Again as with the 1973 CBA, the 1976 CBA contained the identical Article XXXI, paragraph 103, as follows:

XXXI

HOSPITAL-MEDICAL-SURGICAL INSURANCE

103. The Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of this Agreement.

(Exhibit 2a, page 52).

Thus the 1976 CBA represented a policy shift by Morrell not to include H.M.S. benefits for past retired employees (employees who had retired at a time when previous CBAs were in effect). The CBA represents a clear intent not to include the past retirees in the H.M.S. program by contractual agreement.

The logical inference for this change in posture is that the company became aware of the case of *Allied Chem. & Alkali Workers of Am., Local Union v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). *Pittsburgh Plate Glass* held that retired employees were not a part of the employee bargaining unit and that a bargaining agent was under no mandated statutory duty to represent retirees in negotiations with employer. It held that bargaining for retirees was permissive only and not a mandatory requirement of collective bargaining.

Neither in the 1976 CBA nor in its Appendix F is there found any express contract terms requiring past retirees to be contractually furnished H.M.S. benefits beyond the expiration of the CBA. The contract is clear and unambiguous.

13. *1979 CBA* (September 1, 1979-September 1, 1982), (Exhibits 10a and 10b).

The 1979 CBA, Appendix F (Exhibit 10b), page 17, provided for H.M.S. benefits to those employees retiring after September 1, 1979. It read in part as follows:

ARTICLE IX

RETIREMENT BENEFITS

9.1 Normal, Early or Disability Retirees:

(a) Benefits: All Employees who retire on or after September 1, 1979, under Normal Retirement, Early Retirement or Disability Retirement (including Joint & Survivor Option for each) as provided in the Supplemental Agreement on Pensions (hereinafter referred to as "Retired Employees") shall be furnished at Company expense effective as of the time of retirement, the following:

. . .

(b) After Retirees Death:

(1) When a Retired Employee dies who has not selected a Joint and Survivors option, the surviving spouse and dependent children will continue to be covered only for the remainder of the month in which death occurred.

(2) When a Retired Employee dies who has selected a joint and survivor form of pension, the above coverage shall continue for the surviving spouse and dependent children until the earlier of the surviving spouse's death or remarriage, or, in the case of a dependent child, until the earlier of the termination of the child's status as a dependent, or termination of coverage for the surviving spouse.

Again the contract Article XXXI paragraph 104 Hospital-Medical-Surgical constituted a limitation on the duration of coverage. The clause is similar to paragraph 103 of the 1973 and 1976 CBAs. It read as follows:

XXXI

HOSPITAL-MEDICAL-SURGICAL INSURANCE

104. The Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of this Agreement as modified by the Memorandum of Agreement dated July 12, 1979. Details of the Health and Welfare Plan will be published in a separate booklet.

(Exhibit 10a, page 55). The Memorandum Agreement dated July 12, 1979, referred to in paragraph 104, provided in part as follows:

HOSPITAL-MEDICAL-SURGICAL

MAJOR MEDICAL PLAN

The Company shall provide coverage under this Plan to all persons (and their eligible dependents) employed by the Company *in a bargaining unit* [2] covered by the Master Agreement . . . .

(Exhibit 6, Appendix B, page B-1; emphasis supplied).

Nothing in the Agreement referred to past retirees. Retirees by contract referred to those employees who retired after September 1, 1979, the date of the commencement of the 1979 CBA.

14. In connection with the bargaining conducted prior to the effective date of the 1979 CBA, much discussion was had during the trial to a side letter dated July 12, 1979 (Exhibit 7). The letter was written by M. Lee Bishop on behalf of Morrell and accepted by Jesse Pro-

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[2] Exhibit 10a, Appendix A, page 59, defines the bargaining unit for Sioux Falls as "[a]ll the employees, excluding supervisors, foremen, assistant foremen, all general office employees, all salesmen, and the over-the-road drivers." The Court notes that retired former employees are not included.

sten on behalf of UFCW. The letter read in part as follows:

> During the course of the 1979 contract negotiations, the Union presented to the Company certain requests for improvement in the health care benefit program for employees who retire prior to September 1, 1979 ("Past Retirees"). The Company has taken the position that it has no legal obligation to bargain with the Union with respect to the benefits of Past Retirees.
>
> Without any waiver of the legal position of either party, however, the Company has advised the Union that, as a matter of Company policy, the Company intends to announce that effective September 1, 1979, the Company will extend the following benefit programs to retirees currently covered by a Company H.M.S. and who have retired prior to September 1, 1979. . . .

The clear message of this letter is that Morrell was not bargaining for H.M.S. benefits (or for that matter any benefits) for those persons who had retired prior to September 1, 1979 ("past retirees"). Again, without express reference to *Pittsburgh Plate Glass*, it is clear that the Company was maintaining its position that it was not recognizing UFCW as the bargaining agent for past retirees. Witness William Burns, negotiator for UFCW, admitted that *Pittsburgh Plate Glass* was an issue discussed. (Tr. 392). William Burns was the assistant to UFCW's chief negotiator and chairman of the health and welfare committee at the bargaining table. As a result, any H.M.S. benefits for those persons were to be provided as a result of the administrative policy of Morrell to recognize past employees for the contributions which they made to the Company's success over the years. The testimony of William Burns is as follows: (Tr. 415).

> Q Did the company tell you it intended to announce effective September 1, 1979, the company

would extend the following benefit program to retirees?

A Yes. Yes, they did.

Q Did the company tell you they were going to do that as a matter of company policy?

A We drafted the letter; they agreed to it and the letter says what it says.

Q Mr. Burns, I am not asking what the letter says. I am asking you did the company tell you that they intended to do this, to make these changes as a matter of company policy? That's exactly what they told you, isn't it?

A They said they were going to make the changes, correct.

Q They told you they made the changes as a matter of company policy, didn't they?

A Yes, they did.

Q And you read that letter at the time?

A Yes, I did.

Q You understood that it was accurate when it said they were going to make these changes as a matter of company policy? That was an accurate reflection of their position?

A Yes, it was.

Q You initiated the letter?

A Correct.

Q Indicating your acceptance it was accurate?

A Yes.

. . .

Q All right. This company was taking the position that it had no legal obligation to bargain with the Union with respect to the benefits of past retirees, wasn't it?

A Yes, it did.

Q That's what they say in the letter?

A That's correct.

. . .

Q Mr. Burns, the letter says the company has taken the position that it has no legal obligation to

bargain with the Union with respect to the benefits of past retirees. Do you see that sentence?

A Yes.

Q You told me that was an accurate statement of their position in 1979?

A Yes.

Q It is, isn't it?

A Yes, it is.

15. The respective CBAs were never submitted to a vote of the past retirees. None of them were invited to the bargaining sessions. There was no bargaining unit consisting of retirees.

16. After the 1979 agreement expired on September 1, 1982, active employees represented by the UFCW at all plants covered by the master agreement engaged in legal economic strikes. Morrell ceased providing health care benefits for striking employees at its own expense, and instead provided coverage only if paid for by the striking employees. (Stip. D-5).

17. During the strike referred to in the preceding paragraph, Morrell continued to provide health care benefits to members of the retiree class. (Stip. D-6).

18. *September 11, 1982* Agreement.

On September 1, 1982, a new collective bargaining agreement became effective between Morrell and UFCW pursuant to a Memorandum of Agreement signed by the parties on September 11, 1982. It contained an Appendix F setting forth health care benefits for active hourly employees and dependents, including hourly employees who retired during the term of the 1982 agreement. (Stip. D-7).

The 1979 CBA by its terms expired September 1, 1982. Normally negotiations for a new CBA would have been conducted during 1982; however, a new CBA was not concluded. (Tr. 51). Instead, a Memorandum of Agreement dated September 11, 1982, Exhibit 11,

was signed. The lack of a formal 1982 CBA is not significant. The effect of the 1982 agreement was to extend the Master Agreement then in effect (1979 CBA) for another three years, September 1, 1982, to August 31, 1985, with certain exceptions. In the 1982 agreement there is no reference to retiree benefits.

19. After the amended 1982 agreement expired on September 1, 1985, active employees represented by the UFCW at all plants covered by the master agreement engaged in legal economic strikes. Morrell ceased providing health care benefits for striking employees at its own expense, and instead provided coverage only if paid for by the striking employees. (Stip. D-9). It continued to provide H.M.S. benefits for retirees.

20. As explained earlier (Finding #8), CBAs for major packing plants in the United States were arrived at through a process of pattern bargaining. The purpose was to permit them to remain competitive with each other. Wilson Foods Corporation was one of these major competitors. Wilson Foods suffered financial setbacks and filed for bankruptcy under Chapter 11 (reorganization) in 1983. This created a desire on the part of Morrell to renegotiate the 1982 agreement because Wilson Foods had drastically reduced wages and benefits under its bankruptcy. If Morrell were to remain competitive it would have to do likewise. To reduce wages and benefits would require a new CBA. (Tr. 52-53). Accordingly, Morrell and UFCW renegotiated the terms of the 1982 agreement. The task of the 1983 reopener negotiations was to bring about a reduction in Morrell's wages and benefits to restore its ability to compete with Wilson Foods. Substantial wage cuts were made. Medical benefits were changed to provide for copayments and deductibles as well as adjustments in eligibility.

The negotiations resulted in the 1983 Memorandum of Agreement dated September 24, 1983 (Exhibit 12).

21. *1983 Agreement* (October 3, 1983, to August 31, 1985 (Exhibit 12).

The amendments to the health care plan (page 8) set forth the changes. In general, the health care plan provided for reduced benefits, cost sharing, and deductibles.

Paragraph (f) provided as follows:

> (f). Appendix F of the Master Agreement shall be amended to provide that present retirees, and employees retiring during the term of this Agreement, and their dependents, shall be covered under all coverages of the foregoing plan, . . .

Exhibit 12, p. 9.

The Court finds that the 1983 agreement was an agreement to renegotiate the 1982 CBA and the reference to present retirees in paragraph (f) referred to those persons who had retired under the CBA. To extend the meaning to *all* retirees *whenever retired* would read into the agreement terms going beyond those of the 1982 CBA.

22. 1982 CBA (September 1, 1982—September 1, 1985) (Exhibits 13a and 13b).

The 1982 CBA did not become effective until January 1, 1984. In the interim period after the 1979 CBA expired (September 1, 1982) and January 1, 1984, the agreement of September 11, 1982, (Exhibit 11) and October 3, 1983 (Exhibit 12) constituted the Labor-Managment Agreement in the absence of the formal Master 1982 CBA. Finally, however, the 1982 CBA was completed effective January 7, 1984. (Exhibit 13a).

In the 1982 CBA H.M.S. benefits weer defined as follows:

SECTION A. HEALTH-CARE BENEFITS FOR ACTIVE EMPLOYEES

Article I—Definitions

1.1 An "Eligible Employee" shall be any regular full-time employee other than as indicated below, . . . The following shall be ineligible for coverage:

a. . . .

b. Individuals who have quit or have been discharged or terminated from emloyment.

. . .

Exhibit 13b.

Nothing in the agreement refers to past retirees. On the contrary, page 29 of Exhibit 13b contains a section on retirement benefits for "all employees who retire during the term of this Master Agreement." Paragraph 1.1 (a).

As with prior CBAs, the 1982 CBA contained a limiting clause as to H.M.S. coverage.

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HOSPITAL-MEDICAL-SURGICAL INSURANCE

104. The Hospital-Medical-Surgical Insurance Plan described in Appendix F, attached to the 1979-1982 Master Agreement, will remain in effect for the duration of this Agreement, as modified by the Memorandum of Agreement dated September 11, 1982, the Memorandum of Agreement ("Esterville Agreement") dated June 30, 1983, the Memorandum of Agreement ("Sioux Falls Agreement") dated effective October 3, 1983 and the Memorandum of Agreement ("East St. Louis Agreement") dated December 11, 1983. Details of the Health and Welfare Plan will be published in a separate booklet.

The termination clause is substantially the same as clauses in previous CBAs.

23. *1985 CBA*. (November 20, 1985, to November 19, 1988), (Exhibits 21a and 21b).

The 1982 CBA and its Appendix F had an expiration date of September 1, 1985. Negotiations between Morrell and UFCW resulted in a Memorandum of Agreement dated November 18, 1985 (Exhibit 19). This agreement formed the basis for the 1985 CBA covering retroactively the period of November 20, 1985, to November 19, 1988.

The purpose of the November 18, 1985, agreement was to continue the 1982 CBA pending approval of the formal 1985 Master Agreement. The customary procedure was followed, that is to say, the practice of the parties was to cover by a memorandum of agreement the period between the expiration of one CBA and the commencement of a succeeding CBA. This would insure the continuation of a company-union contract.

An examination of the Memorandum of Agreement reveals no reference to H.M.S. coverage for retirees who may have retired prior to or during the 1982 CBA. The only reference to Appendix F concerned vision care benefits which provided for Company contribution for contact lenses and a two-visit limitation for oral dental examination. (Exhibit 19, page 6).

The finalized 1985 CBA and its Appendix F continued to define the persons covered as was done in the previous 1982 CBA. The identical language in Appendix F was brought forward from the 1982 CBA as follows:

SECTION A. HEALTH CARE BENEFITS FOR ACTIVE EMPLOYEES

Article I—Definitions

1.1 An "Eligible Employee" shall be any regular full-time employee other than an indicated below . . . . The following shall be ineligible for coverage:

a. . . .

b. Individuals who have quit or have been discharged or terminated from employment.

. . .

(Exhibit 21b, page).

The 1985 CBA contained no language which provided for the vesting of H.M.S. benefits to past retired employees.

Finally, the 1985 term clause as related to H.M.S. benefits is also identical to previous term clauses. The now familiar language of section 104 in the 1979 CBA, Exhibit 10a, page 55, was carried forward in the 1985 CBA as follows:

XXXI

HOSPITAL-MEDICAL-SURGICAL INSURANCE

104. The Hospital-Mental-Surgical Insurance Plan described in Appendix F, attached to this Agreement, will remain in effect for the duration of this Agreement.

(Exhibit 21a, page 44).

DISCUSSION—CONCLUSION OF LAW

In 1974 the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* was enacted to "protect interstate commerce in the interests of participants in employee benefit plans" by establishing disclosure and reporting requirements, standards of conduct for plan fiduciaries, and access to federal courts. 29 U.S.C. § 1001(b).[3]

---

[3] The benefit package and pension plan at issue in this case constitutes a "plan" within the meaning of ERISA. Company witness John Powers testified that the 1985-88 Appendix is the official ERISA plan document. (Transcript of Court Trial (Tr.) Vol. II, pp. 329-30).

Pension plans and employee benefit plans are two different categories under ERISA and are treated differently. Welfare plans are subject to the reporting and disclosure requirements and the fiduciary standards of ERISA; however, ERISA does not regulate the substance of the plans. *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987), citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S. Ct. 2380, 2385, 85 L. Ed. 2d 728 (1985).

> [ERISA] was not designed to prohibit modification of these ancillary [non-accrued] benefits. *See* H.R. Conf. R. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5054; H.R.Rep. No. 807, 93d Cong., 2d Sess. 60-61, *reprinted in* 1974 U.S.Code Cong. & Ad. News 4639, 4670-4726. Rather, Congress believed that the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R.Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.Code Cong. & Ad. News 4890, 4935. An employer may change such benefits without violating ERISA.

Anderson, 830 F.2d at 876, quoting *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205, 104 S. Ct. 2387, 81 L. Ed. 2d 345 (1984).

Pension plans provide retirement income to employees for periods extending beyond the termination of the employment. Therefore, they are presumably vested benefits. *See* 29 U.S.C. § 1002(2)(A). Pension plans are subject to ERISA's stringent vesting requirements, 29 U.S.C. § 1053 ("Each pension plan shall provide that employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age."). Welfare plans, on the other hand, are specifically exempt from these vesting requirements. 29 U.S.C. § 1051.

"In enacting ERISA, Congress apparently determined that subjecting employee welfare benefit plans to the same vesting, funding, and trust requirements as pensions plans would be so costly as to discourage employers from providing welfare benefits at all." *Schwartz v. Interfaith Medical Center*, 715 F. Supp. 1190, 1196 (E.D.N.Y. 1989) citing, H. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 4639, 4639-40.

Therefore, welfare benefits do not automatically vest as a matter of law and the benefits may be altered or terminated by the employer, absent some contractual agreement to the contrary. *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990) (citing *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-17 (8th Cir. 1988), *cert. denied sub nom. Anderson v. Slattery Group, Inc.*, 489 U.S. 1051, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989)).

This distinction between pension and insurance benefits is understandable in light of the nature of the benefits at issue. Pension benefits are fixed, easily calculable benefits. Employers can accordingly accurately estimate the costs of funding an employee pension plan. On the other hand, the costs of funding an employee welfare plan including health care benefits is unpredictable given the uncertainty of cost of medical care. Wiht these principles in mind, the Court turns to their application in the context of this labor-management case.

Generally, any rights conferred under a labor contract do not survive beyond the expiration of the CBA. *See, e.g., Merk v. Jewel Cos., Inc.*, 848 F.2d 761 (7th Cir.), *cert. denied*, 488 U.S. 956, 109 S. Ct. 393, 102 L Ed. 2d 382 (1988). Therefore, if the health benefits are unambiguously limited to the term of the relevant agreement, the benefits are not vested. *Anderson v. Alpha Portland Indus., Inc.*, 647 F. Supp. 1109, 1126 (E.D. Mo. 1986), *aff'd*, 836 F.2d 1512 (8th Cir. 1988) (citations omitted).

To be sure, the parties may provide that certain rights extend beyond the term of a CBA. *International Union, United Auto., Aero., & Agric. Implement Workers of Am. v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied* 465 U.S. 1007, 104 S. Ct. 1002, 79 L. Ed. 2d 234 (1984) citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555, 84 S. Ct. 909, 917, 11 L. Ed. 2d 898 (1964). Whether the benefits survive the expirations of the CBA depends on the intent of the parties. *Yard-Man*, 716 F.2d 1476 at 1479. In such a case, the retirees bear the burden of proving that the benefits are vested and not tied to the agreement which created them. *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 771 F. Supp. 992, 998 (E.D. Mo. 1991), *aff'd* 961 F.2d 1384 (8th Cir. 1992), citing, *Dubuque Packing*, 756 F.2d at 69-70; *see also, Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d at 1516-17; *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812, 815 (8th Cir. 1988), *vacated and remanded sub nom., DeGeare v. Slattery Group, Inc.*, 489 U.S. 1049, 109 S. Ct. 1305, 103 L. Ed. 2d 575 (1989).[4] In *DeGeare* the Court stated:

> Regardless of whether the plan documents were the subject of negotiation, the plaintiffs must establish their case by a preponderance of the evidence if they are to prevail. Further, it is especially important that [retirees] bear the burden of proof in cases such as this where the benefits in question are unilaterally provided by the employer. Accepting plaintiffs' argument would lead to the anomalous result that Alpha would have to prove a negative—that it did

[4] The Supreme Court remanded *DeGeare* based on its decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). The Eighth Circuit noted in *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 n.4 (8th Cir. 1990) that the remand did not affect the central part of the *DeGeare* decision and the basic contract interpretation principles articulated therein still apply.

> not promise lifetime benefits—every time plaintiffs choose to file a lawsuit.

DeGeare, 837 F.2d at 815.

The burden does not shift simply because retirees are defendants in this declaratory judgment action. *See, e.g., Travelers Ins. Co. v. Greenough*, 88 N.H. 391, 190 A. 129 (1937). Morrell should not bear the burden of proof on an issue which has traditionally been held to be the retirees' burden simply because it expeditiously availed itself of the Declaratory Judgment Act. Therefore, the ultimate burden of proof remains on the defendants. *See Board of Regents of Univ. of Nebraska v. Dawes*, 522 F.2d 380, 383 n.9 (8th Cir. 1975), *cert. denied*, 424 U.S. 914, 96 S. Ct. 1112, 47 L. Ed. 2d 318 (1976) (burden of proof in action under Equal Pay Act rested on defendant class even though University initiated the declaratory judgment action).

If the parties intended that the retiree health benefits vest upon retirement, then Morrell has no right to unilaterally alter or terminate those benefits without the retirees' consent. *See, e.g., Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 92 S. Ct. 383, 398 n.20, 20 L. Ed. 2d 341 (1971). On the other hand, Morrell may modify or terminate these benefits absent a *specific expression* of contrary intent by the employer. *Meester v. IASD Health Servs. Corp.*, 963 F.2d 194, 197 (8th Cir. 1992), citing, *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990); *see also, Anderson v. John Morrell & Co.*, 830 F.2d 872, 877 (8th Cir. 1987) (if employer undertakes to contractually provide indefinite welfare benefits, there must be a specific expression of the employer's intent to be bound).

Accordingly, the issue facing the Court is whether the CBAs contain a "specific expression" of Morrell's intent to provide vested lifetime benefits to its eligible retirees. Under Eighth Circuit law, this issue is "simply one of

contract interpretation." *Alpha Portland*, 836 F.2d at 1516 (quoting *Dubuque Packing*, 756 F.2d at 70.)

In determining whether the parties intended to provide vested health care benefits for retires, the Court must first examine the language of the plan documents. *Alpha Portland*, 836 F.2d at 1517. If the contract is deemed ambiguous, then the Court may weigh extrinsic evidence to resolve the ambiguity. *Id.* An ambiguity exists if the contract language reasonably gives rise to two different interpretations.

Each provision of the CBA should be read consistently with the others and the terms must be construed to render none of them nugatory and to avoid illusory promises. *DeGeare*, 837 F.2d at 816, citing *Yard-Man*, 716 F.2d at 1479-80.

Guided by these principles, the Court finds that the retirees have not satisfied their burden of proving these benefits are vested lifetime benefits. The CBAs do not contain a specific expression of Morrell's intent to provide benefits beyond the term of the CBA. To the contrary, the CBAs expressly and unambiguously provide that the H.M.S. plan would remain in effect for the duration of the respective CBA.[5] In short, the language of the CBAs reflect the intent of the parties to limit retiree coverage to the term of the currently effective CBA.[6] It is not necessary to examine extrinsic evidence to determine the intent of these unambiguous contracts.

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[5] *See, e.g.*, Exhibit 1a, the 1973 CBA at page 52, ¶ 103.

[6] The Court has not failed to note the argument of UFCW that to limit coverage to retirees for the length of the CBA would mean that if an employee retires one day before the expiration of the CBA there would be only one day of H.M.S. benefits provided. This argument is somewhat attractive, but it does not consider the overriding principle that the labor-management agreements were *agreed* to terminate on a date certain. While the consequences may be unfair, indeed somewhat harsh, they do not provide a reason for the Court to make a contract for the parties based upon its own concept of fairness.

Morrell points out that each CBA contains a general duration clause and argues that this points to additional evidence the H.M.S. benefits cease at the end of the CBA term. An example of these duration clauses is found in the 1976 CBA, Exhibit 2a, page 54, as follows:

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TERM

> 111. Except as otherwise provided, all of the provisions of this Agreement shall take effect as of [the effective date] and shall remain in effect until [the termination date], . . .

Similar language is found in the 1979 CBA, Exhibit 10a, page 57; 1982 CBA, Exhibit 13a. page 62 (also reflecting the reference to the various Memorandum of Agreements leading to the finalized 1982 CBA); 1985 CBA, Exhibit 21a, page 46.

The Court discounts Morrell's arguments and instead relies on the more specific term clause contained in each CBA relating specifically to H.M.S. benefits. While the Court discounts the importance of the general duration clause vis-a-vis the specific H.M.S. duration clause, this does not mean that the presence of the general duration clause is completely irrelevant to the Court's determination. It is inconsistent with the concept of vesting ot hold that the retiree benefits continue for life in the face of a specific termination clause which limits the benefits to the term of the contract. In the somewhat unique context of labor-management relations, the nature of collective bargaining is such that CBAs of necessity terminate on a date certain to be followed and in most cases preceded by a new round of negotiations. Had UFCW sought permission to bargain for retirees, undoubtedly it possessed the knowledge of how to do so.

Despite a general desire that retired Morrell employees should have adequate H.M.S. coverage, the Court cannot

transfer such desire into contract provisions in what otherwise are clear and unambiguous contracts which contain no such provisions.

The Court further finds that the coordination of benefits clauses found in the 1979, 1982, and 1985 CBAs are inconsistent with UFCW's vesting claim. The effect of a coordination of benefits clause is to require the company to pay benefits only to the extent of the difference between the full amount of the benefits allowable and the payments made toward such benefits under such other plan. 1979 CBA, Exhibit 10b, pages 46-47. *See also* 1982 CBA, Exhibit 13b, Article III, page 4, and 1985 CBA, Exhibit 21b, Article III, page 4. *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1519 (8th Cir. 1988).

The extrinsic evidence consisting of contract negotiations and Morrell's communications to retirees are at best inconclusive and itself ambiguous. The contract themselves are the best evidence as to whether Morrell is required to provide fixed, lifetime H.M.S. benefits to retired employees. Much of the extrinsic evidence is contradictory and speculative. It forms no independent basis for the Court to depart from well-established rules of construction.[7]

As the Court has found, there are no vested rights to fixed, lifetime H.M.S. benefits for Morrell retired employees. The fact that Morrell as a matter of policy has determined that it would not forsake those past employees in their health care coverage who had provided loyal and lengthy service to the Company hardly rises to the level

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[7] The Court has considered the issue of whether *Amcar Div., ACF Indus., Inc. v. NLRB*, 641 F.2d 561 (8th Cir. 1981) provides it with a separate, independent ground on which to interpret these CBAs. The Court finds that *Amcar* is inapplicable to this ERISA case. It is not authority for this Court to interpret an otherwise unambiguous contract by the use of the suggested extrinsic evidence.

required for estoppel. There is no showing that the retirees have in any way changed their position based upon any promise by the Company. Whether the doctrine of estoppel applied in an ERISA case may be an open question; however if it exists at all, it does not exist in this case.

The Court this date enters a judgment consistent with this opinion.

Dated this 24th day of June, 1993.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

ATTEST:

WILLIAM F. CLAYTON
Clerk

By: /s/ Alice R. Raisly
Deputy Clerk

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2863SDRC

JOHN MORRELL & CO.,

Appellee,

vs.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; BERNARD J. ANING, as representative of a defendant class,

Appellants.

Appeal from the United States District Court
for the District of South Dakota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 12, 1994

A true copy.

ATTEST: /s/ Michael E. Gaus
Clerk
U.S. Court of Appeals
Eighth Circuit

[Mandate Issued Jan. 26, 1995]

APPENDIX D

[Filed Jun. 24, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 91-4184

JOHN MORRELL & CO.,

Plaintiff,

vs.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, and BENARD J. ANING, personally and as a representative of a defendant class of others similarly situated,

Defendants.

JUDGMENT

Pursuant to the memorandum opinion filed this date, it is

ORDERED, ADJUDGED, AND DECREED that plaintiff shall have judgment against defendants.

IT IS FURTHER ORDERED, ADJUGED, AND DECREED that former Morrell employees retiring prior to April 1, 1989, do not have vested lifetime health, medical, and surgical benefits.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Morrell may unilaterally change or eliminate existing benefits.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that costs in the amount of $———— shall hereinafter be taxed and inserted by the Clerk.

Dated this 24th day of June, 1993.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

ATTEST:

WILLIAM F. CLAYTON
Clerk

By: /s/ Alice R. Raisly
Deputy Clerk

(SEAL)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-2863SDRC

JOHN MORRELL & CO.,
Appellee,

vs.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,
Appellants.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Wollman would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

January 17, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus
Clerk
U.S. Court of Appeals
Eighth Circuit

OPPOSITION

BRIEF

(3) 94-1803

Supreme Court, U.S.
FILED
MAY 8 1995
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, AND BERNARD J. ANING, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

JOHN MORRELL & CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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Rule 29.1 Statement

Pursuant to Rule 29.1 of the Rules of this Court, respondent John Morrell & Co. states that its parent corporation is Chiquita Brands International, Inc. John Morrell & Co. has no non-wholly owned subsidiaries.

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No.

IN THE

Supreme Court of the United States

October Term, 1994

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, AND BERNARD J. ANING, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

JOHN MORRELL & CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

Statutory Provisions Involved

Petitioners suggest that the only statutory provision involved in this case is Sec. 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185(a). The petition ignores the two federal statutory provisions most directly involved in any employee benefits litigation.

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, provides in relevant part:

> (a) A civil action may be brought—
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.
>
> . . .
>
> (e)
>
> (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a).
>
> (2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served

> in any other district where a defendant resides or may be found.

Section 402(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1102(a)(1), provides in relevant part:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

Counterstatement of the Case

This is a highly factual case, carefully evaluated and correctly decided by both the trial court which heard the evidence and the Court of Appeals which affirmed the district court's thoughtful decision. Those judgments belie petitioners' Statement of the Case, which employs a selective and distorted statement of facts to suggest that the District Court and Court of Appeals applied an "interpretative rule" to override the evidence. The "statement of facts" ignores or misstates the decisive facts that led both courts below to conclude that John Morrell & Co. did not agree to provide "vested" lifetime health benefits to retirees. Those facts are set forth in both opinions below (Petitioners' Appendix (hereinafter "App.") at 1a, 17a) and may be fairly summarized as follows:

Before this Court's decision in *Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding that retiree benefits are not a mandatory subject of collective bargaining), the Morrell collective bargaining agreements ("CBAs") with the United Food and Commercial Workers ("the union") described medical benefits that past retirees would receive under each new CBA. *Pittsburgh Plate Glass* opened the door for employers such as Morrell to decline to negotiate with unions

about past retiree benefits, and Morrell did exactly that. Morrell's former chief labor negotiator testified to this change, and a union executive conceded it. (JA 10 at 234; 455-56).[1]

Beginning in 1976 and continuing through every relevant labor agreement (1976-1979-1982-1985), the Morrell-union CBAs and health care appendices only covered health benefits for employees working and retiring during the term of the contract and only for the duration of that contract. Each CBA contained a general term clause which limited the duration of all of its provisions, including the health care provisions, to the term of the contract.[2] Each CBA also had a specific clause which limited the duration of the medical benefits to the term of the CBA:

> [T]he Hospital-Medical-Surgical Insurance Plan described in Appendix F will remain in effect for the duration of this agreement.[3]

There was no provision in any CBA or its Appendix F (all of the contested CBA's included an Appendix F on medical benefits) which said that past retirees were entitled to any health benefits, let alone fixed, permanent benefits, or that employees who retired during any contract were entitled to any particular benefits after that CBA expired. In striking contrast to the treatment of

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[1] "JA" cites are to the Joint Appendix filed with the Eighth Circuit Court of Appeals.

[2] The 1976, 1979, 1982 and 1985 CBA general term clauses can be found at JA 12 at 743; JA 20 at 975; JA 23 at 1116; and JA 29 at 46, respectively.

[3] The 1976, 1979, 1982 and 1985 CBA specific durational clauses can be found at JA 12 at 742; JA 20 at 974; JA 23 at 1114; and JA 29 at 44, respectively.

welfare benefits, the *pension* benefits appendix of each CBA contained "vesting" language. (*Compare* JA 20 at 1032 with JA 20 at 1012-13).

Company executives testified at trial that since 1976 Morrell has provided health benefits for retirees as a management decision and a matter of company policy. (JA 10 at 202). As part of the 1979 negotiations, Morrell delivered a July 12, 1979 side letter to the union which clearly stated that Morrell would not bargain about past retiree benefits, and that Morrell was providing health benefits to past retirees as a matter of company policy. (JA 17). That letter was acknowledged and countersigned by the Union's International Vice President. (JA 17 at 933). Two of the union's key witnesses at trial admitted that the union understood Morrell's position, that Morrell's letter was an accurate statement of that position, and that the union accepted Morrell's position. (JA 10 at 455-56; 476-80).

While several retirees testified to their belief that they were entitled to fixed lifetime benefits, their belief was contradicted by undisputed evidence that retiree health benefits had in fact been reduced by the company during the period in dispute. In December 1983, after contract reopener negotiations ended in employee wage and benefit reductions, Morrell decided to reduce past retiree benefits, so that past retirees would not have better benefits than employees and for convenience in benefits administration. (JA 10 at 286-87). Morrell used a letter and a benefits summary to inform retirees of changes in their health benefits paralleling the changes made for active employees, including a deductible and a co-payment requirement. (JA 24, 25). It is uncontested that the benefits of past retirees were reduced by these new payment requirements in 1983.

From January, 1984 to the time this lawsuit was filed in December, 1991, Morrell provided employees who retired prior to April 1, 1989 and their eligible dependents with health benefits. Those benefits were as described in the benefits summary and in the CBA Appendix F. Morrell reserved its right to change those benefits in the benefits summary, which contained a provision stating that the retirees' benefits are "subject to modification and termination in accordance with applicable law." (JA 25 at 1156).

Morrell filed this action requesting a declaratory judgment that Morrell had the unilateral right to change or terminate retiree health benefits. Morrell named as a defendant The United Food and Commercial Workers International Union as the union which represents Morrell hourly employees and had disputed Morrell's right to make unilateral benefits changes. Morrell also named Benard J. Aning, a retiree and former union officer, as a representative of a Rule 23 defendant class of retirees in order to obtain a complete resolution of this issue in a single lawsuit. Instead of "forum shopping" as suggested by the petitioners, Morrell filed its declaratory judgment lawsuit in Sioux Falls, South Dakota, where Morrell has its headquarters and largest plant and where the largest group of retirees reside.[4]

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[4] In fact, John Morrell and the union have a history of litigation in the Eighth Circuit. *See John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 804 F.2d 457 (8th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) (upheld jury damage verdict of $24,600,000 in favor of Morrell for union's breach of no-strike provision); *John Morrell & Co. v. United Food & Commercial Workers*, 992 F.2d 205 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 554 (1993); *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 949 F.2d 266 (8th Cir. 1991).

Morrell moved for summary judgment, but that motion was denied and the case proceeded to trial. The trial involved four days of testimony by 20 witnesses, and some 100 exhibits including five consecutive collective bargaining agreements. After the bench trial, the District Court entered judgment for Morrell on all issues contested by the parties. (App. at 53a). The District Court found and the Court of Appeals majority agreed that the petitioners failed to meet their burden of proof and that Morrell had not committed itself to provide the retirees with fixed health benefits. In so holding, both the District Court and the Court of Appeals considered and reflected in their opinions the documentary evidence and testimony offered by witnesses for both sides about the history of collective bargaining negotiations between the parties, about the administration of employee and retiree health benefits, and about the history and meaning of the significant provisions of the collective bargaining agreements and their health benefits appendices. The Court of Appeals in particular made it a point to examine the evidence on bargaining history first, find that the bargaining history did not support the claim to vested benefits, then examine the CBAs and health benefit appendices to find that the health benefits were not contractually vested. (App. at 4a).

Summary of Argument

Presumably recognizing the failure of several prior certiorari petitions asking this Court to construct rigid rules governing employee welfare benefits under ERISA (and protect retirees from benefits changes where benefit plans do not do so), petitioners have taken the novel approach of ignoring ERISA and premising their argument on general federal labor law. Petitioners' labor law argument is a huge red herring.

Section 301 of the Labor Management Relations Act is a federal preemption statute, not a source of benefit law rules. Federal courts hearing cases about the benefits of retired union members have had no difficulty in deciding parallel claims under the Employee Retirement Income Security Act and § 301 by applying consistent principles of contract construction.

Petitioners' strenuous arguments about a supposed three-way conflict among the circuits as to how to interpret these contracts reads well until compared with what the courts of appeals are actually doing. All of the circuits use a federal common law of contracts analysis for deciding benefits cases; none use presumptions, none shift the burden of proof. Petitioners ask this Court to replace that contract analysis with a special rule—surely one treating retiree health benefits as vested—when doing so would ignore the Congressional policy embodied in ERISA and disrupt the consistent application of that policy by the lower courts.

Reasons For Denying the Writ

I. Petitioners' Focus on § 301 of the LMRA Ignores Congress' Enactment of ERISA for the Regulation of Employee Benefits.

1. Years After Congress Enacted § 301 To Preempt State Law Governing Labor Matters, Congress Enacted ERISA to Provide a Comprehensive Body of Federal Law Governing Employee Benefits.

Congress enacted § 301 of the Labor Management Relations Act in 1947 as a Congressional mandate that courts develop a body of federal common law to address disputes arising out of labor contracts. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The intended purpose of § 301 was to assure that matters of labor policy be uniformly decided by federal versus state courts. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Almost thirty years after Congress enacted § 301, Congress recognized the need for another mandate specifically providing for the federal regulation of employee benefits. Congress enacted ERISA in 1974 to "protect . . . participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987), quoting ERISA § 2 as set forth in 29 U.S.C. § 1001(b). Like its counterpart § 301 providing for the federal regulation of labor agreements, ERISA's "crowning achievement" was its "reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans." *Id.* at 46, quoting Representative Dent,

120 Cong. Rec. 29, 197 (1974). To promote Congress' intention that employee benefits be subject to a uniform body of federal law, Congress crafted into the statute deliberately expansive preemption provisions, "thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." *Id.* at 45-46.

During the more than twenty years since the enactment of ERISA, the federal courts have executed Congress' dictate that they develop a body of federal common law to govern employee benefits. It is that body of federal common law—premised upon traditional contract and trust law principles—that the courts now consistently apply in addressing employee benefit disputes.

2. Section 301 Provides For Federal Regulation of Labor Law. Section 301 Does Not Provide Rules Which Override ERISA in the Regulation of Employee Benefits.

There is a critical flaw in petitioners' request that this Court establish "the proper, uniform LMRA § 301 interpretative rule that governs suits on a collectively bargained provision for retiree health insurance" (Pet. at (i)). Petitioners falsely contend that § 301 serves as a "'congressional mandate' . . . to formulate interpretative rules" for addressing labor contract provisions (Pet. at 13), misconstruing and misquoting this Court's opinion in *Allis-Chalmers* for support. In fact, in *Allis-Chalmers* this Court said nothing about any need to formulate interpretative rules under § 301. That case presented the direct policy concern embodied in § 301, that state law claims be preempted by federal labor contract law. This Court held that the respondent's state-law claim alleging bad-faith handling of an insurance claim under a disability plan in a collective bargaining agreement was preempted by § 301. Nothing less, nothing more.

In actuality, § 301 stands simply as a directive that suits over labor contract violations be governed by federal law. It says nothing about the substance of what parties may agree to in a labor contract. *Allis-Chalmers*, 471 U.S. 202, 211 (1985). Nor does it tell the courts to develop litmus tests for interpreting labor agreements. Section 301 was enacted in 1947 "as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Id.* at 209. Section 301 stemmed from Congress' recognition that "[t]he possibility that individual contract terms might have different

meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 210, quoting *Lucas Flour Co.*, 369 U.S. at 103. Through § 301, Congress assured that state rules purporting to define the meaning or scope of a contract term would be preempted by federal labor law. *Id.*

Executing the Congressional directive embodied in § 301, courts have developed a body of law which addresses contract disputes utilizing traditional rules of contract interpretation, unless their application is inconsistent with federal labor policies. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). In certain instances, courts have found it appropriate in § 301 actions requiring the interpretation of labor agreements to look to the parties' particular bargaining history as well as the practice, usage and custom pertaining to such agreements. *Transportation Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 159-61 (1966). Where the disputes involve welfare benefits, courts of appeal typically acknowledge the existence of an asserted § 301 claim, while looking to ERISA and its federal body of law to ultimately resolve these disputes. *See, e.g., Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied sub nom., Anderson v. Slattery Group, Inc.*, 489 U.S. 1051 (1989); *Struble v. New*

Jersey Brewery Employees Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984).[5]

Petitioners in this case had the full benefit of an analysis of their claims under both federal labor policy and ERISA. Specifically, in the opinion below, the Eighth Circuit recognized that:

> the plans at issue were appendices to collective bargaining agreements, and it is usually unwise to construe collective bargaining agreements without regard to their bargaining history. Therefore, before examining the relevant Master Agreement provisions, we will review the negotiating history of these Agreements as it relates to retiree health benefits. (App. at 4a).

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[5] Petitioners' implication that § 301 is the source of a uniform set of interpretative rules is further undermined by the fact that most disputes over the interpretation of collective bargaining agreements are resolved by arbitrators rather than the courts. This Court has instructed that courts must refer labor contract disputes to arbitrators unless forceful evidence exists of a purpose to exclude the grievance from arbitration. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). This deference is granted because of the "greater institutional competence of arbitrators in interpreting collective-bargaining agreements." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986). *See also Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984). When an arbitrator's decision is challenged in court, a reviewing court does not interpret the contract but asks only whether the arbitrator's award "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The result is a myriad of individual arbitral awards, not a single body of federal law governing labor contract interpretation.

Petitioners' contention that the Eighth Circuit ignored federal labor policy in deciding their case conflicts with the record establishing the court's exhaustive legal and factual analysis.[6]

Petitioners ask this Court to ignore ERISA and turn back the hands of time to the days when § 301 would have provided the only basis for federal jurisdiction over changes to collectively-bargained benefits. *See Pittsburgh Plate Glass*, 404 U.S. at 181, n.20 (recognizing pre-ERISA that a retiree "would have a federal remedy under § 301. . . . if his benefits were unilaterally changed"). Even if § 301 provided an arsenal of interpretative rules before ERISA, which it did not, petitioners' disregard of ERISA in asking this Court to fashion interpretative rules under § 301 conflicts with this Court's consistent approach in dealing with multiple statutes relating to the same subject matter. A fundamental principle of statutory construction is that "a specific statute will not

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[6] Petitioners also claim that "considerations of labor policy that weighed so heavily in *International Union, United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) play no role in the Eighth Circuit's analysis [because] the court below cited three cases, each of which involved interpretation of unilateral employer-created ERISA plans, not collective bargaining agreements." (Pet. at 15-16 n.13). Petitioners' assertion is simply wrong. In fact, the Eighth Circuit Court of Appeals relied upon many cases involving collectively-bargained benefits to reach its decision, including *Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386-87 (8th Cir. 1992); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied sub nom., Anderson v. Slattery Group, Inc.*, 489 U.S. 1051 (1989); *Local Union No. 150-A v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985).

be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). *See also Morales v. Trans World Airlines*, 112 S. Ct. 2031, 2037 (1992); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). If two applicable statutes irreconcilably conflict, the more recent statute prevails. 2B Norman J. Singer, *Sutherland Stat. Constr.* § 51.02 (5th ed. 1992); *The San Pedro*, 15 U.S. 2 Wheat. 132, 141 (1817). Undoubtedly, § 301 would have provided the only available federal remedy in benefits disputes about union member retirees before ERISA. But since 1974, when Congress recognized the need to enact a more detailed and comprehensive scheme for regulating employee benefits, the general labor law policy dictates of § 301 have shared the playing field with ERISA. Where appropriate, federal labor law principles of contract interpretation contribute to the federal body of law under ERISA to resolve benefit disputes. This is a scheme that works in harmony, honoring the policy concerns embodied in both federal statutes.

II. The Federal Common Law Consistently Applied By the Courts Achieves the Uniformity Congress Intended in Welfare Benefits Regulation.

1. ERISA Case Law Recognizes That Pensions Are Statutorily Vested, Welfare Benefits Are Not.

In enacting ERISA, Congress made a deliberate decision to require the statutory vesting of pensions but not welfare benefits. H.R. Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4726; S. Rep. No. 93-383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4890, 4935. Unlike pensions, "Congress intended employers to be free to create, modify, or

terminate the terms and conditions of employee welfare benefit plans as inflation, changes in medical practice and technology, and the costs of treatment dictate." *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993). Congress has recognized that "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans. . . ." H.R. Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4726; S. Rep. No. 93-383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4890, 4935, cited in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). Earlier this year, this Court summarized the law governing claims to health benefits as follows:

> In interpreting § 402(b)(3), we are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. *See Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"). Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 895, 90-91, 77 L.Ed. 2d 490, 103 S. Ct. 2890 (1983).

Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995).[7]

Petitioners' request that this Court adopt rigid "interpretative rules" governing the vesting of welfare benefits flies directly in the face of this Court's expressed unwillingness to create what Congress rejected. This Court has specifically noted that judicial intervention to infer a vested right in a welfare plan is particularly inappropriate when viewed in the context of a "comprehensive and reticulated" statute such as ERISA. *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361 (1980); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). Similarly, courts of appeals have adhered to the recognition that judicial construction of welfare plans "must be tailored to avoid undermining Congress' 'considered decision that welfare benefit plans not be subject to a vesting requirement.' " *Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st Cir. 1992).

Recognizing that the case law developed under ERISA refuses to graft onto ERISA that which Congress deliberately rejected—vesting of welfare benefits—petitioners attempt an "end run" around the statute and the cases. They look to § 301 to do their blocking and open the way for more advantageous "interpretative rules" to govern suits over collectively-bargained retiree health

[7] Petitioners attempt to sidestep this clearly settled law by a host of arguments, including a footnote argument at Pet. 16 that the Eighth Circuit decision below has improperly afforded employees less benefits protection "than they enjoyed before ERISA was enacted," citing a 1961 book entitled *The Legal Status of Employee Benefit Rights Under Private Pension Plans*. As might be expected from its title, that book is about pensions, not health benefits. Petitioners are describing the law as it never was—while ignoring Congress' policy decisions in enacting ERISA.

benefits. Petitioners ignore the fact that ERISA and § 301 are on the same team.

2. The Contract Analysis Consistently Applied By All Circuits Respects ERISA's Intention That Welfare Benefits Not Automatically Vest But Be Left to Private Agreement.

Petitioners seriously misstate the decisions of the Courts of Appeals in their clever attempt to avoid ERISA's reach. First, petitioners claim that the Fourth and Sixth Circuits:

> have developed an interpretative rule that treats a collectively bargained promise to provide health insurance to retirees as creating an accrued or vested right in those who retire during the term of the collective agreement. (Pet. at (i)).

In truth, as addressed below, no circuit has adopted such an automatic, inflexible rule. Second, petitioners' more general contention that circuits have adopted different "interpretative rules" in suits about retiree health benefits is completely contrived.

There is, in fact, a simple set of rules in place to decide welfare benefits cases. Without exception, all of the circuits uniformly rely on traditional contract principles to resolve these disputes, whether or not a collective bargaining agreement is involved. *See, e.g., Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st Cir. 1992) (judicial construction of welfare plans "must be tailored to avoid undermining Congress's 'considered decision that welfare benefit plans not be subject to a vesting requirement.' "); *In re Chateaugay Corp.*, 945 F.2d 1205, 1208 (2d Cir. 1991), *cert. denied sub nom., United Mine Workers 1974 Benefit Plan & Trust v. LTV Steel Co.*, 502 U.S. 1093 (1992); *Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir.

1986); *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 330 (3d Cir. 1984); *District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 590 (4th Cir. 1985) ("whether the parties intended ... employer's obligation to continue beyond the expiration of the collective bargaining agreement is primarily a question of contract interpretation"); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990) (traditional rules of contract interpretation apply, since "[t]he parties do not identify, and we have not found, any federal labor policy favoring or disfavoring fixed health insurance premiums for retirees."); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1293 (6th Cir. 1991) ("enforcement and interpretation of collective bargaining agreements is governed by traditional rules of contract interpretation as long as their application is not inconsistent with federal labor policy"); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 671 (6th Cir. 1985) ("We agree with the district court's conclusion that the only issue presented is one of contract interpretation . . ."); *International Union, United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (". . . the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent."); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Senn v. United Dominion Indus.*, 951 F.2d 806, 816 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1993); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989) ("efficacy of appellants' claim under ERISA turns solely upon the terms of the written instruments governing the plan"); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied sub nom.*,

Anderson v. Slattery Group, Inc., 489 U.S. 1051 (1989) (issue is "simply one of contract interpretation"); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984) ("The sole question, then, is whether the collective bargaining agreements unambiguously limited the term of the medical benefits."); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) (court applies "traditional rules of contractual interpretation", recognizing that federal labor policy neither favors nor disfavors the vesting of retirees' health benefits).

Reliance on traditional contract principles to resolve these disputes comports with ERISA's deliberate decision to exempt welfare benefits from statutory vesting requirements. As explained by the Eighth Circuit in *Anderson v. Alpha Portland:*

> The exemption from ERISA's vesting requirements does not prohibit an employer from extending benefits beyond the expiration of the collective bargaining agreement. Rather, the exemption allows the parties to determine the duration of the welfare benefits. Thus, the issue is "simply one of contract interpretation." *Anderson*, 836 F.2d at 1516.

At the same time, use of a traditional contract analysis to resolve these disputes honors the one requirement which ERISA does prescribe in welfare plan design—that benefits be maintained pursuant to a written plan document. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). A traditional contract analysis—which looks to the language of the parties' agreement—provides a consistent analysis for all circuits to apply, thus promoting ERISA's goal of uniformity in employee benefit regulation. At the same time it respects ERISA's deliberate decision to leave the vesting of welfare benefits as a matter of private decision or contract.

3. The Sixth and Fourth Circuits Follow The Same Traditional Contract Analysis As All Other Circuits In Resolving Retiree Health Benefits Disputes Involving Collective Bargaining Agreements.

Petitioners would have this Court believe that:

> the Sixth and Fourth Circuits have developed an interpretative rule that treats a collectively bargained promise to provide health insurance to retirees as creating an accrued or vested right in those who retire during the term of the collective agreement. (Pet. at (i)).

According to petitioners, a rule exists in the Sixth Circuit that "normally retiree health benefits are vested," derived from the Sixth Circuit's decision in *International Union, United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d at 1479 (Pet. at 13). Petitioners could not be more wrong. In *Yard-Man*, the Sixth Circuit applied the same traditional contract analysis as other circuits in addressing benefit disputes under collective bargaining agreements. The Sixth Circuit expressly recognized that ". . . the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent." *Id.* The Court of Appeals then applied principles of federal labor contract interpretation, examining not only the language of the agreement but the context in which the benefits arose. *Id.* at 1482. As part of that examination, the Sixth Circuit observed that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* At the same time, the Court of Appeals carefully stated that "[n]or does any federal labor policy identified to this

Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent." *Id.*

Some confusion and misunderstanding resulted among lower courts within the Sixth Circuit from the Sixth Circuit's suggestion of an "inference" in *Yard-Man*. The Sixth Circuit has taken great care in case law following *Yard-Man* to clarify that it has not adopted a presumption in favor of vesting. *See, e.g., Local 784, United Automobile Workers v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984) (explaining that "there is no legal presumption based on the status of retired employees"); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1191 (6th Cir. 1986) (explaining that the *Yard-Man* "line of collective bargaining cases" merely "defer to the contractual terms set by the parties, with no such rule of 'federal common law' overlaying the parties' expressed intent").[8]

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[8] As the courts of appeals have recognized, an inference is relatively inconsequential—it is not a presumption. While under Fed. R. Evid. 301 a presumption "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof", the Federal Rules of Evidence do not even recognize an inference. *See* 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5124 (1977) (inferences lack an element of legal compulsion, thus Rule 301 does not apply to "mere inferences").

The Eighth Circuit recognized the importance of this distinction when it rejected the *Yard-Man* inference in *Anderson v. Alpha Portland Indus.*, 836 F.2d at 1517. The *Anderson* court stated that "the burden of proof still remains on the plaintiffs" even under the *Yard-Man* inference, noting the Sixth Circuit's own recognition in *International Union v. Cadillac*, 728 F.2d at 808, that "[i]nferences do not shift the burden of proof." *Anderson*, 836 F.2d at 1517.

Petitioners' claim that "in the Sixth Circuit, the *Yard-man* inference almost always carries the day" (Pet. at 17) is best rebutted by the Sixth Circuit's holdings *for the employer* in the two most recent retiree health benefit cases before it. In each case, the Sixth Circuit used a traditional contract analysis to resolve the dispute. *See Adcox v. Teledyne*, 21 F.3d 1381, 1389 (6th Cir. 1994) ("We are mindful of 'Congress' considered decision that welfare benefit plans not be subject to a vesting requirement'" and finding that 'under certain circumstances' employee welfare plan benefits may vest contractually."); *Aldridge v. Mosler, Inc.*, 47 F.3d 1167 (6th Cir.), reported in full, 1995 U.S. App. LEXIS 2985 (6th Cir. Feb. 14, 1995) (upholding employer's right to reduce retiree medical benefits under the unambiguous language of the collective bargaining agreement). Only petitioners, not the Sixth Circuit, have elevated the *Yard-Man* inference to a rule of law.

Petitioners' assertion that different interpretative rules determine the outcome in these cases (Pet. at 9-11 and 17-18) is further undermined by the fact that in the Eighth Circuit's most recent case addressing retiree health benefits, *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 131 L. Ed. 310 (1995), the Court of Appeals, applying a contract analysis, found in favor of *retirees*. Significantly, the opinions in *Jensen* and in this case were both written by Circuit Judge Loken, and were decided within one day of each other. That the Court of Appeals reached opposite results in the two cases is due to the differences in the testimony and written benefit plans at issue in each case, not due to any "outcome-determinative" interpretative rule.

Petitioners make another sweeping assertion that "[t]he courts of appeals have begun to choose up sides

in this Sixth Circuit - Eighth Circuit disagreement." (Pet. at 16). To support that position, they argue that the Fourth Circuit has adopted the *Yard-Man* "rule", as evidenced by its holding in *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989). In actuality, in *Keffer* the Fourth Circuit followed the approach of all other circuits, "look[ing] to the parties' intent as expressed in their agreement." *Id.* at 62. Like the Sixth Circuit, the Fourth Circuit did not shift any burden of proof, nor did it adopt any presumption. To the extent petitioners' contention is premised on the Fourth Circuit's review of bargaining history evidence in the interpretation of labor agreements, petitioners themselves benefited from the same analysis by the Eighth Circuit. Specifically, in the opinion below, the Eighth Circuit recognized that:

> the plans at issue were appendices to collective bargaining agreements, and it is usually unwise to construe collective bargaining agreements without regard to their bargaining history. Therefore, before examining the relevant Master Agreement provisions, we will review the negotiating history of these Agreements as it relates to retiree health benefits. (App. at 4a).

Petitioners' claim that the Seventh Circuit "has formulated yet a third rule" (Pet. at 9) in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir.), *cert. denied*, 114 S. Ct. 291 (1993) falls equally short. In *Wheelabrator*, the Seventh Circuit applied traditional contract principles and expounded at length on the appropriateness of doing so. While concurring and dissenting judges discussed how presumptions could be used in these types of cases and suggested different ways to approach these cases, the Seventh Circuit did not adopt any presumption or even any inference favoring employers or

retirees. Traditional contract principles dictated the court's decision and left the Seventh Circuit in accord with every other circuit.

Petitioners ask this Court to bridge a gulf between the circuits which does not exist, presumably hoping that a grant of certiorari would be an opportunity to convince this Court to issue a rule or directive (in conflict with ERISA) to protect retiree benefits from changes. But try as they might, petitioners cannot show defection by any of the circuits from the consistent application of traditional contract principles in resolving these disputes.

Conclusion

Petitioners have fashioned a unique argument in an effort to overcome the record in this case and this Court's standards for reviewing petitions for certiorari. But their argument, no matter how cleverly crafted, ultimately fails. Petitioners are seeking relief in the wrong forum. Congress has woven the fabric of ERISA; it is only Congress who can unravel its threads. The courts have done their part to promote the policies embodied in ERISA—they have developed a body of federal common law to govern employee benefit disputes. In so doing, the courts have honored Congress' directive that welfare benefits vest only as a matter of private design and have looked to contract principles to resolve contract disputes. This is an approach that works in all courts, that provides fairness to all parties. By asking this Court to announce a "rule" under § 301 to control the decisions in welfare benefits cases, petitioners are really asking this Court to undo a central part of ERISA's comprehensive regulatory scheme.

For the reasons set forth above, we respectfully submit that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, and BERNARD J. ANING, individually and on behalf of a class of others similarly situated,

Petitioners,

v.

JOHN MORRELL & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR PETITIONERS

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1. Whatever its intended purpose, respondent's central argument for denying the *certiorari* petition *confirms*—rather than refutes—the petition's central argument for granting *certiorari*.

The heart of respondent's brief in opposition (at pp. 9-18) is a lucid outline of *an* approach—the approach of the Eighth (and Fifth) Circuits—to determining the legal significance of a collectively-bargained promise to provide health insurance to employees who retire during the term of the agreement. The proper course for a court to take in such a case, says respondent, is to "acknowledge the existence of an asserted § 301 claim, while looking to ERISA [the Employee Retirement Income Security Act,

29 U.S.C. §§ 1001 *et seq.*] and its federal body of law to ultimately resolve these disputes." Resp. Br. at 12. Doing so, one finds that ERISA does not, as a matter of law, mandate the vesting of retiree health insurance or other welfare benefits. Thus, "judicial intervention to infer a vested right in a welfare plan is particularly inappropriate." Resp. Br. at 17. From this respondent concludes that "look[ing] to § 301 to . . . open the way for more advantageous 'interpretative rules' to govern suits over collectively-bargained retiree health benefits" is an " 'end run' around the statute [ERISA]." Resp. Br. at 17-18.

But respondent's difficulty—and the law's—is that no matter how logical all this may appear to some, the Sixth (and Fourth) Circuits start from *different* legal premises that lead to a *different* legal conclusion. And, the Seventh Circuit starts from still different premises and reaches a third different conclusion.

Under the Sixth Circuit analysis, Congress' decision not to *mandate* vesting of welfare benefits by statute does not throw a cross light on the proper interpretation of collectively bargained promises to provide for retiree health coverage. Contracting systems are not about copying the rights and obligations already settled by public law, but about the negotiation of private agreements on matters *not* settled by public law.

The Sixth Circuit regards two labor law points as telling: first, retiree benefits "are typically understood as a form of delayed compensation or reward for past services;" and, second, since "[b]enefits for retirees are only permissive not mandatory subjects of collective bargaining" under the National Labor Relations Act, unions can only guarantee that employees receive such deferred compensation after retirement by creating accrued or vested rights. *Autoworkers v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007.

This analysis, rooted in the labor law rather than in ERISA, "demonstrates," in the Sixth Circuit words, "the likelihood that continuing insurance benefits for retirees were intended." *Id.*[1]

Because the two approaches just outlined have almost nothing to do with each other, after putting on a brave show, respondent is reduced to name calling: the "labor law argument," we are told, is "a huge red herring." Resp. Br. at 8. But the salient point at this jurisdictional stage of this case is that the Sixth (and Fourth) Circuit's herring is a fish of a different kind and color than the one swimming through the Eighth (and Fifth) Circuits—and both are different than the Seventh Circuit fish—and that the resulting conflict in the circuits is, indeed, "huge."

2. Remarkably, after nine pages extolling the Eighth Circuit's ERISA-based theory and disparaging the Sixth Circuit's competing, labor law-based theory, respondent turns around 180 degrees and denies that there are competing legal theories that govern § 301 retiree health insurance cases. The higher principle that harmonizes the dissonance, according to respondent, is that "all of the circuits uniformly rely on traditional contract principles to resolve these disputes." Resp. Br. at 18. All the circuits, in other words, begin from the unexceptional premise that in these § 301 actions, as in all others, the parties' intent is determinative, and that their intent is to be discerned through the text of the agreement, the bargaining history and the like. See Resp. Br. 18-20. If appellate court agreement at that level of abstraction were all the legal uniformity that § 301 guarantees, that guarantee would be hollow indeed.

Respondent's soothing assurance simply ignores the point Judge Easterbrook made in the Seventh Circuit's

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[1] As we developed in the *certiorari* petition (at pp. 16-17), the Seventh Circuit has developed a third interpretive approach to § 301 retiree health insurance provisions.

retiree health insurance case—"law provides the background against which the parties' words carry meaning." *Bidlack v. Wheelabrator Corp.*, 993 F.2d 604, 620 (7th Cir. 1993 (dissenting opinion), *cert. denied*, 114 S.Ct. 291. And, as we show in our petition—a showing respondent's brief (at pp. 9-18) *confirms*—the appellate courts' differing understandings of the applicable, background law has led them to announce conflicting interpretive rules as to the meaning of collectively-bargained promises of retiree health insurance.

In the Sixth Circuit, "normally retiree health benefits are vested," *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d at 672. In the Eighth Circuit it "seems illogical to infer an intent to vest," *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988). *And, see Bidlack v. Wheelabrator Corp., supra,* for the Seventh Circuit's "intermediate" interpretative rule. That is plainly the kind of circuit conflict that generates confusion and unsettled legal rights and that this Court sits to resolve.

3. Respondent would downplay the significance of these conflicting interpretive rules by offering the following evidence of uniformity: the Sixth Circuit has ruled "for the employer in the two most recent retiree health benefit cases before it" whereas in the "Eighth Circuit's most recent case addressing retiree health benefits the Court of Appeals . . . found in favor of retirees." Resp. Br. at 23 (emphasis omitted). Respondents misstate the cited cases and their significance.

One of the two Sixth Circuit cases respondent cites had nothing whatsoever to do with retiree health benefits.[2] The other—an unpublished, *per curiam* opinion not

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[2] *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994), did not involve retiree benefits at all but involved instead *severance pay* (denaminated a "special distribution benefit"). The plaintiffs there claimed that their right to such pay vested upon the closing of the plant so as to foreclose the union and the employer from negotiating a plant closing agreement which superseded the preexisting

even citable within the Sixth Circuit—involved a change in retiree health benefits which that court sustained on the ground that "the collective bargaining agreement '*unambiguously* allows the Defendant to change the retirees' benefits to the same extent that the Defendant changes the benefits for the active employees.' "[3] The area of contention here, as we noted in our petition, is "generated by contract language that is less than crystal clear." Pet. at 10. The great preponderance of litigated § 301 cases arise in that area, not in the area, occupied by *Aldridge*, in which the contractual provision is unambiguously clear.

Thus, neither of the cases cited by respondent detracts from our showing that "in the Sixth Circuit the *Yard-Man* inference almost always carries the day and collectively-bargained promises of retiree benefits are consistently interpreted to create accrued or vested rights." Pet. at 17.

Conversely, the Eighth Circuit case on which respondent relies did not even involve a collectively bargained retiree health insurance provision.[4] That case does not so

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collective bargaining agreement and which provided a variety of benefits (including continuation of retiree health insurance) in lieu of severance pay. The court of appeals held, however, that even under the preexisting contract the plaintiffs were not entitled to severance pay because that contract provided such pay only for persons not "eligible for a pension under any pension plan" and the *Adcox* plaintiffs *were* eligible for a deferred pension.

[3] The collective bargaining agreement in *Aldridge v. Mosler*, C.A. No. 93-3061 (6th Cir., Feb. 14, 1995) expressly stated that should "the group health care program for active employees change, the program for retirees will change accordingly." Thus, the Sixth Circuit's conclusion that the agreement "unambiguously" permitted the changes at issue in that case was hardly surprising.

[4] The sole question in *Jensen v. Sipco, Inc.*, 38 F.2d 945 (8th Cir. 1994), *cert. denied*, 131 L.Ed. 310 (1995), was whether the reservation of rights clause in the employer's unilaterally-created health plan sufficed to prevent retiree benefits from vesting; the court answered that question in the negative.

much as implicate, much less consider, the conflicting ERISA-based/labor law-based interpretative rules that apply to collectively-bargained retiree health insurance provisions depending on the litigation forum. And, that case most certainly does not detract from our showing that in the Eighth Circuit collectively-bargained promises of retiree health insurance do not survive the termination of the agreement. *See* Pet. at 14-15.

3. Just one year ago, in a less adversarial setting, respondent's lead counsel in the instant case observed that whereas the Sixth Circuit "has adopted a pro-employer stance in the nonunion setting," in retiree health insurance cases that circuit "takes a noticeably different approach when dealing with the termination or modification of benefits provided pursuant to a collective bargaining agreement." Boies & Ross, *The Struggle Over Retiree Medical Benefits: Who's on Top?*, 19 Emp. Rel. L. J. 169, 177-78, 181 (1993). Respondent's counsel contrasted the Sixth Circuit law with the Eighth Circuit law which "has repeatedly recognized the employer's right to modify or terminate retiree medical benefits in both the nonunion and union setting." *Id.* And, respondent's counsel concluded that article with advice to employers as to how to go about modifying or terminating retiree health insurance, including the following:

> The likelihood of litigation in this area thus suggests another useful tool—the chance to conduct the litigation in an advantageous forum. *The outcome of a retiree benefit case may largely depend on the different presumptions, burdens of proof, and evidence entertained by the courts.* Employers astutely aware that litigation is likely to ensue as a result of plan modifications or termination may be wise to seek a declaratory judgment of their right to make such changes in an appropriate jurisdiction before affected retirees or their union files a law suit. With proper plan language *and the application of a favorable legal analysis*, employers are likely to achieve

court approval in modifying retiree health care benefits. [*Id.* at 185 (emphasis added).] [5]

This is precisely the situation § 301 was enacted to avoid. We submit that the time has come for this Court to determine the appropriate § 301 rule governing the interpretation of collectively-bargained promises of retiree health insurance.

CONCLUSION

For the reasons stated in the *certiorari* petition and in this reply brief, the petition should be granted.

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[5] Contrast the statement in text with respondent's claim in its brief:

> Petitioners' strenuous arguments about a supposed three-way conflict among the circuits as to how to interpret these contracts reads well until compared with what the court of appeals are actually doing. All of the circuits use a federal common law of contracts analysis for deciding benefits cases; none use presumptions, none shift the burden of proof. [Resp. Br. at 8]